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Cover Page Footnote

Member of the New York Bar; member, American Bar Association Conference on Presidential Inability and Succession.

THE VICE-PRESIDENCY AND THE PROBLEMS OF PRESIDENTIAL SUCCESSION AND INABILITY

JOHN D. FEERICK*

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.¹

THE orderly transfer of power to President Lyndon B. Johnson upon the tragic death of our late President, John F. Kennedy, clearly revealed one remarkable strength of our Government—its continuity. Succession by the Vice-President was swift and unquestioned. No gap occurred in our executive leadership since there was no doubt about who was to take over at the helm of the Government—the Vice-President. As was noted at the time: “[A] few lines in the Constitution . . . have made the Government of the United States a continuum that calamities like this . . . cannot interrupt or break.”²

Despite (or perhaps because of) the smooth manner in which executive power changed hands on November 22, 1963, the entire mechanism of succession has again come under public and congressional scrutiny. Newspaper columnists in particular, public figures, and others have voiced strong criticism of various inadequacies in the present system.³

* Member of the New York Bar; member, American Bar Association Conference on Presidential Inability and Succession.

1. U.S. Const. art. II, § 1, cl. 6.

2. Krock, *The Continuum: Kennedy's Death Points Up Orderly Progression in U.S. Government*, N.Y. Times, Nov. 24, 1963, § 4 (*The News of the Week in Review*), p. 9E, cols. 1-2.

3. For a sampling of the criticisms of the present succession law, see Childs, *Succession*, N.Y. Post, Nov. 29, 1963, p. 50, cols. 1-2 (“This is the time to adopt a carefully thought-out plan of succession.”); Eisenhower, *When the Highest Office Changes Hands*, Saturday Evening Post, Dec. 14, 1963, p. 15, col. 4; Lawrence, *Presidential System Flaws Seen in Fixing of Tenure*, N.Y. Herald Tribune, Dec. 11, 1963, p. 27, cols. 1-2 (“The weakness is the obligation written in the Constitution requiring that Presidential and Congressional elections be held at fixed times.”); Lippmann, *The Presidential Succession*, Wash. Post, Dec. 12, 1963, p. A21, cols. 1-3 (“There are several very grave objections to the present law.”); Morris, *The Muddled Problem of the Succession*, N.Y. Times, Dec. 15, 1963, § 6 (*Magazine*), p. 11; Nixon, *We Need a Vice President Now*, Saturday Evening Post, Jan. 18, 1964, p. 6; Reston, *The Problem of Succession to the Presidency*, N.Y. Times, Dec. 6, 1963, p. 34, col. 5 (“Congress has been remarkably casual about this succession problem from the start of the Republic.”); Wilmerding, Jr., Wash. Post, Dec. 8, 1963, p. 1, cols. 2-3, p. A13, cols. 1-4 (“To cast doubt upon the constitutionality of the act of 1947 is to confuse a problem already difficult enough. But that the doubt exists can scarcely be denied.”); Letter From Joseph L. Allen to N.Y. Times, Dec. 4, 1963, p. 46,

The Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, under the chairmanship of Senator Birch Bayh of Indiana, has just conducted extensive hearings at which members of the Congress and the public have presented their views and proposals as to how the inadequacies can be corrected.⁴ There was general agreement that the time for Congress to eliminate these inadequacies is now, while there is widespread concern about them.

In the main, attention has been focused on three subjects—the Vice-Presidency, the present succession law, and the inability provision of the

col. 7 ("More reasonable provisions can be imagined."); *N.Y. Times*, Dec. 15, 1963, § 4 (The News of the Week in Review), p. 8E, cols. 1-2 ("The deficiencies inherent in the present law, the obscurity of some of its provisions and the unresolved doubts about its constitutionality urgently require reappraisal . . ."); *id.* p. E9, cols. 3-5 (listing of views of other newspapers). See also Drummond, *President's Party Is Seen Best Suited to Fill Vacancy*, *N.Y. Herald Tribune*, Dec. 13, 1963, p. 21, cols. 1-2; Montgomery, *Presidential Succession*, *N.Y. Journal-American*, Dec. 10, 1963, p. 23, cols. 5-7; Letter From Martin Taylor to *N.Y. Times*, Dec. 22, 1963, § 4 (The News of the Week in Review), p. 6E, cols. 7-8.

For a sampling of the criticisms of the failure of Congress to solve the problem of presidential inability, see Drummond, *A Gap At Top If President Should Fall Seriously Ill*, *N.Y. Herald Tribune*, Dec. 6, 1963, p. 19, cols. 1-2 (It is "imperative" that "the gaping hole in the Constitution as to what happens when a President is temporarily unable . . ." be repaired.); Krock, *Succession Problem; The Death of Kennedy Again Points Up the Need to Devise Solution*, *N.Y. Times*, Dec. 8, 1963, § 4 (The News of the Week in Review), p. 9E, cols. 1-2 ("[T]he dreadful event at Dallas, Tex., on Nov. 22 has alerted Congress and the people to the problems as never before."); Krock, *The Continuum: Kennedy's Death Points Up Orderly Progression in U.S. Government*, *N.Y. Times*, Nov. 24, 1963, § 4 (The News of the Week in Review), p. 9E, cols. 1-2; Krock, *The Cart Is Getting Ahead of the Horse*, *N.Y. Times*, Dec. 12, 1963, p. 38, col. 6; Lewis, *Presidential Disability Problem Stirs Concern*, *N.Y. Times*, Dec. 22, 1963, § 4 (The News of the Week in Review), p. 4E, cols. 1-6 ("The need for some agreed solution is conclusively demonstrated by history."); Lippmann, *The Problem of a Disabled President*, *N.Y. Herald Tribune*, Dec. 17, 1963, p. 24, cols. 4-5 ("[T]he problem of a disabled President . . . is insoluble without a workable solution of the problem of the succession."); Letter From Martin Taylor to *N.Y. Times*, Dec. 22, 1963, § 4 (The News of the Week in Review), p. 6E, cols. 7-8 ("What is much more important and receiving much less attention is the failure to deal with the constitutional uncertainty as to the inability of the President."); *N.Y. Times*, Dec. 7, 1963, p. 26, cols. 1-2 ("President Johnson's agreement with Speaker John W. McCormack . . . is no adequate solution for this difficult problem."); *N.Y. Times*, Dec. 1, 1963, § 4 (The News of the Week in Review), p. 10E, cols. 3-4 ("The time to clarify Presidential inability or disablement is now—when the subject of succession is in the forefront of the thoughts of a shocked nation."); *N.Y. Times*, Nov. 24, 1963, § 4 (The News of the Week in Review), p. 8E, cols. 3-4 ("The assassination of John F. Kennedy forces once again on the American people the necessity for correcting an important defect in the Constitution."). See also Letter From Cornelius W. Wickersham to *N.Y. Herald Tribune*, Dec. 26, 1963, p. 16, col. 7 ("Presidential Inability"); Letter From Author to *N.Y. Times*, Nov. 17, 1963, § 4 (The News of the Week in Review), p. 8E, col. 7 ("Fixing Presidential Succession").

4. Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 88th Cong., 2d Sess. (1964).

Constitution. The purpose of this article is to examine these interrelated subjects. First, a brief history of the Vice-Presidency is presented. Then, the various succession laws are examined and the present proposals to change the 1947 law are considered. Finally, the recent proposals for solving the problem of presidential inability are discussed. The author's article in the October issue of this volume contains the details of this problem and it will be referred to where appropriate.⁵

I. THE VICE-PRESIDENCY

The succession of Lyndon B. Johnson to the Presidency has left a vacancy in the office of Vice-President for the sixteenth time in our history. The Nation is now in its thirty-seventh year without a Vice-President. Eight Vice-Presidents have succeeded to the Presidency,⁶ seven have died in office,⁷ and one has resigned from office.⁸ A study of the Vice-Presidency is essential for a thorough understanding of the problems of succession and inability.⁹

5. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, supra this volume, at 73 (1963).

6. They are: John Tyler (April 4, 1841), Millard Fillmore (July 9, 1850), Andrew Johnson (April 15, 1865), Chester A. Arthur (September 19, 1881), Theodore Roosevelt (September 14, 1901), Calvin Coolidge (August 2, 1923), Harry S. Truman (April 12, 1945), and Lyndon B. Johnson (November 22, 1963). The dates are those on which the respective incumbents died. See note 50 *infra* on the question of when the Vice-President becomes President. Andrew Johnson, Roosevelt, Truman, and Lyndon B. Johnson took the presidential oath on the same day the incumbent died. Taylor, Arthur and Coolidge took it on the following day and Tyler, two days later. The oaths were administered by the following:

Tyler: Chief Judge William Cranch of the Circuit Court for the District of Columbia.

Fillmore: Judge Branch of the Federal District Court for the District of Columbia.

Johnson: Chief Justice Salmon P. Chase of the United States Supreme Court.

Arthur: Judge John R. Brady of the New York Supreme Court and Chief Judge Morrison R. Waite of the United States Supreme Court.

Roosevelt: Judge John R. Hazel of the Federal District Court for the District of Columbia.

Coolidge: His father, a state magistrate and notary public; and Judge A. A. Hoehling of the Supreme Court of the District of Columbia.

Truman: Chief Justice Stone of the United States Supreme Court.

Johnson: Texas Federal District Court Judge Sarah T. Hughes.

Excluding President Lyndon B. Johnson's service, succeeding Vice-Presidents have served almost 23 years of a possible twenty-eight.

7. They are: George Clinton (April 20, 1812), Elbridge Gerry (November 23, 1814), William R. King (April 18, 1853), Henry Wilson (November 22, 1875), Thomas A. Hendricks (November 25, 1885), Garrett A. Hobart (November 21, 1899), and James S. Sherman (October 30, 1912). The deaths of these men left the Vice-Presidency vacant for over 13 years of a possible 28.

8. He is John C. Calhoun (December 28, 1832). The resulting vacancy was for a little over two months.

9. For two excellent studies of the Vice-Presidency, see Waugh, *Second Consul* (1956);

A. Creation and Early History

Surprisingly, the Vice-Presidency seems to have been an afterthought of the framers of the Constitution. It was created in the closing days of the Constitutional Convention of 1787 when there was little time for the careful deliberation which had been given to other parts of the Constitution. Provision for a successor to the President, on the other hand, had existed from the early days of the Convention.¹⁰ There is some doubt as to whether Pinckney's Plan of May 29 contained a presidential succession provision.¹¹ However, Hamilton's Plan of June 18 did include such a provision¹² as did the August 6 report of the Committee on Detail.¹³ The proposed successor at that point was the President of the Senate who would be elected by the Senate from among its members. On August 27, Gouverneur Morris of Pennsylvania proposed that the Chief Justice should be the immediate successor to the President.¹⁴ James Madison disagreed, suggesting that during a vacancy the executive powers should be administered by a council to the President.¹⁵ On September 4 a Committee of Eleven, which had been appointed on August 31 to consider those parts of the Constitution which had been postponed or not acted upon, delivered a partial report to the Convention. It recommended an office of Vice-President as well as election of President and Vice-President by an electoral college.¹⁶

On September 7, the delegates addressed themselves to the office of Vice-President. Almost all of the discussion centered on the Vice-President's position as President of the Senate. Elbridge Gerry thought that the office, as proposed (*i.e.*, combining the functions of succeeding to

Williams, *The Rise of the Vice Presidency* (1956). Other studies are Field, *The Vice-Presidency of the United States*, 56 Am. L. Rev. 365 (1922); Hatch & Shoup, *A History of the Vice Presidency of the United States* (1934); Levin, *Seven by Chance: The Accidental Presidents* (1948); Williams, *The American Vice Presidency: New Look* (1954). See also Tompkins, *The Office of Vice President* (1957) (contains excellent bibliography).

10. For some history about the colonial office of deputy or lieutenant governor, see Feerick, *supra* note 5, at 77-81.

11. *Id.* at 82 & n.45.

12. 1 Records of the Federal Convention of 1787, at 292 (Farrand ed. 1911 & 1937) [hereinafter cited as Farrand].

13. 2 Farrand at 186.

14. *Id.* at 427.

15. *Ibid.* Madison thought that "the Senate might retard the appointment of a President in order to carry points whilst the revisionary power was in the President of their own body . . ." *Ibid.*

16. *Id.* at 493-95. Nathaniel Gorham of Massachusetts registered an objection to the method of election of Vice-President: "[A] very obscure man with very few votes may arrive at that appointment." *Id.* at 499. Roger Sherman of Connecticut approved of the method, saying that it was designed to make the executive independent of the legislature. *Ibid.* For the remarks of other delegates, see *id.* at 500-02.

the Presidency and presiding over the Senate), violated the principle of separation of powers by permitting executive interference in the Legislature.¹⁷ Gouverneur Morris dismissed this notion, arguing that the Vice-President could be expected to be independent of the President ("the vice-President then will be the first heir apparent that ever loved his father") and that it mattered little or not at all whether the successor was a Vice-President who was also President of the Senate or a Senate-elected President of the Senate.¹⁸ Roger Sherman of Connecticut was concerned that, without a Vice-President, some Member of the Senate would be deprived of his vote (most of the time) by being made President of the Senate. He also felt that the Vice-President "would be without employment" if he were not President of the Senate.¹⁹ Hugh Williamson of Delaware stated that "such an officer as Vice-President was not wanted."²⁰ At the conclusion of the discussion the Vice-Presidency was approved by a vote of eight to two.²¹ Surprisingly, the delegates gave little attention "to the chief part which the Vice-President has, in fact, played in history, that is, to his succession in case of the death of the President."²² Similarly, scant attention was paid to the office in the state ratifying conventions.²³

On September 8, a committee was formed to "revise the style of and arrange the articles agreed to by the House."²⁴ On September 12, this committee returned a draft to the Convention which, except for a few changes, was to become the Constitution of the United States. The Vice-President was given only two duties by the Constitution: (1) to preside over the Senate, in which capacity he could vote when the Senate was "equally divided" and open the certificates listing the votes of the presidential electors,²⁵ and (2) to discharge the powers and duties of

17. *Id.* at 536-37.

18. *Id.* at 537.

19. *Ibid.*

20. *Ibid.*

21. *Id.* at 538.

22. Warren, *The Making of the Constitution* 635 (1937 ed.).

23. For an excellent summary of post-Convention discussion on the Vice-Presidency, see Field, *supra* note 9, at 369-73.

24. 2 Farrand at 547, 553. As to how this Committee rendered the succession provision ambiguous, see Feerick, *supra* note 5, at 85-87.

25. U.S. Const. art. I, § 3; *id.*, art. II, § 1. For a good analysis of the casting votes of Vice-Presidents, see Learned, *Casting Votes of the Vice-Presidents, 1789-1915*, 20 *Am. Hist. Rev.* 571 (1915), where the author says that such votes were cast 179 times. See also Hatch & Shoup, *op. cit. supra* note 9, at 101, where it is said that for the period 1789-1929, twenty-four of thirty Vice-Presidents cast tie breaking votes 191 times.

For some congressional discussion of this power, see 6 Cong. Rec. 737 (1877) (debate about whether it can be exercised where question involves membership in the Senate),

the President in case of his death, resignation, removal or inability.²⁶ His was a unique office, neither legislative nor executive but combining functions of both. What his role would be was clouded in such mystery that Alexander Hamilton was impelled to declare in *The Federalist* that:

The appointment of an extraordinary person, as Vice-President, has been objected to as superfluous, if not mischievous. It has been alledged, that it would have been preferable to have authorised the Senate to elect out of their own body an officer answering that description. But two considerations seem to justify the ideas of the convention in this respect. One is, that to secure at all times the possibility of a definitive resolution of the body, it is necessary that the President should have only a casting vote. And to take the senator of any State from his seat as senator, to place him in that of President of the Senate, would be to exchange, in regard to the State from which he came, a constant for a contingent vote. The other consideration is, that as the Vice-President may occasionally become a substitute for the President, in the supreme executive magistracy, all the reasons which recommend the mode of election prescribed for the one, apply with great if not with equal force to the manner of appointing the other.²⁷

The Vice-President, like the President, was to hold office for four years.²⁸ He was to be elected at the same time and in the same manner as the President²⁹ and he was to be subject to impeachment but, while the Constitution provided that the Chief Justice would preside at a trial of the President, no presiding officer was mentioned for a trial of the Vice-President.³⁰ In contrast to its provision of an oath of office for the President, the Constitution prescribed no oath for the Vice-President.³¹ Nor did it mention any qualifications for the Vice-Presidency.

and 47 Cong. Rec. 1950 (1911) (objections to the exercise of power in a matter involving a constitutional amendment).

The opening of the certificates of the presidential electors has been nothing more than a ministerial function of the Vice-President. He does not decide disputed questions about the certificates. Prior to the twelfth amendment, however, Vice-Presidents did exercise such a power. Williams, *The American Vice-Presidency: New Look* 5 (1954).

26. For the development of the succession clause at the Convention, see Feerick, *supra* note 5, at 81-87; Silva, *Presidential Succession* 1-13 (1951), the outstanding treatise on the subject.

27. *The Federalist* No. 68, at 443 (Wright ed. 1961) (Hamilton). See President Truman's interesting observations on the Vice-Presidency, 1 Truman, *Memoirs* 53-57 (1955).

28. U.S. Const. art. II, § 1, cl. 1.

29. *Ibid.*

30. Presumably, the President pro tempore of the Senate would preside at his trial.

31. By An Act of June 1, 1789, 1 Stat. 23, Congress established such an oath. For the oath taken by the Vice-President, see 15 Stat. 85 (1868), 5 U.S.C. § 16 (1958). For an interesting history of the Vice-President's oath, see Learned, *The Vice President's Oath of Office*, 104 *Nation* 248 (1917). The author says that prior to the Civil War it was customary for the President pro tempore to administer the oath to the Vice-President. Since then, it has been customary for the outgoing Vice-President to administer it, except, of course, where the Vice-President has either died or succeeded to the Presidency or the incumbent Vice-President has been given a second term. Learned points out seven excep-

This was not due to oversight or lack of deliberation. The Vice-President would have the same qualifications as the President (*i.e.*, a natural-born citizen, at least thirty-five years of age, and fourteen years a resident within the United States)³² since, under the original method of election, the presidential electors would vote for two persons for President and the person obtaining the second highest number of votes would become Vice-President.³³ This method was designed to place in the office of Vice-President a person equal in stature to the President.

Its purpose was early frustrated, however, because the electors began to distinguish the two votes in their own minds, casting the first for the candidate they considered suitable for the Presidency and the second for their vice-presidential choice. The inherent defect in the original method of election revealed itself in 1800 when most of the Republican electors voted for Aaron Burr and Thomas Jefferson, intending Burr for Vice-President and Jefferson for President. Burr received as many votes as Jefferson so that the election of President fell into the House of Representatives.³⁴ As a result, the mode of election was modified in 1804 by the adoption of the twelfth amendment, which provided that the electors would cast two distinct votes—one designated for President and one designated for Vice-President. The candidate who received a majority of the electoral votes for the respective office would be elected. If no candidate obtained a majority, the House of Representatives would choose a President from the candidates, not exceeding three, who had the highest number of votes for President, and the Senate would choose a Vice-President from the two candidates who had the highest number of votes for Vice-President. If it happened that the election of a President fell into the House of Representatives and the House failed to elect a President by the date set for his term to begin, the Vice-Presi-

tions to the above rules: In 1805, Chief Justice Marshall administered the oath to Vice-President Clinton and President Jefferson and, in 1833, to Vice-President Van Buren and President Jackson. In 1825, Andrew Jackson (then a Senator and the oldest present) administered the oath to Vice-President Calhoun. In 1809, Clinton took the oath at a place away from Washington, D. C., as did Gerry in 1813 (administered by a federal district court judge), Tompkins in 1821, and King in 1853 (administered in Cuba by a consul pursuant to a special act). See note 7 *supra*.

32. U.S. Const. art. II, § 1, cl. 5.

33. See U.S. Const. art. II, § 1. The President was required to obtain a majority of the electoral votes. If he failed to do so, then the House, voting by States, would elect the President from the five highest. (If two candidates had a majority of the electoral votes and were tied, the House would choose between them.) To be elected in the House, a person had to obtain the votes of a majority of the States. The Vice-President would be that person receiving the next highest number of votes of the electors. If there were two or more candidates tied for next highest, then the Senate would choose the Vice-President by ballot. See note 35 *infra*.

34. For a good account of this election, see Waugh, *op. cit. supra* note 9, at 41-48.

dent-elect would act as President.³⁵ In order to insure that the Vice-President would have the same qualifications as the President, the words "no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President . . ." were inserted in the amendment.³⁶

Shortly after the passage of the Constitution, a number of matters concerning the Vice-Presidency came under discussion and the low opinion of the office became evident. In the debates of the First Congress over an annual salary for the Vice-President, some members of the House of Representatives felt that his work would be so sporadic that he should be paid only on a per diem basis.³⁷ Others, including James Madison, believed that not to give him an annual salary would be offensive to the dignity of the second officer of the Government. Said Madison:

If he is to be considered as the apparent successor of the President, to qualify himself the better for that office, he must withdraw from his other avocations, and direct his attention to the obtaining [of] a perfect knowledge of his intended business [I]f we mean to carry the constitution into full effect, we ought to make provision for his support, adequate to the merits and nature of the office.³⁸

An annual salary of \$5,000 was finally decided upon.

The paradox which became evident in these debates was the tremendous gap between what the Vice-President was and what he could be. As Vice-President John Adams declared:

I am possessed of two separate powers, the one *in esse* and the other *in posse*. I am vice-president. In this I am nothing, but I may be everything. But I am president also of the Senate.³⁹

Although two of the first three Vice-Presidents became Presidents in their own right (Adams and Jefferson), the notion that the Vice-Presidency was a sure springboard to the Presidency ceased with the adoption of the twelfth amendment and the rise of political parties. As a result of the

35. Until February, 1933, when the twentieth amendment was adopted, the term began on March 4. Now, of course, it begins on January 20. It is to be noted that under the twelfth amendment the Vice-President must obtain a majority of the electoral votes. In 1836, Richard M. Johnson failed to receive a majority so that the Senate had to choose between him and another. (In such a case, a quorum of the Senate is two-thirds of the membership and a majority of the whole number is necessary to a choice.) Johnson emerged as the winner.

36. For an interesting discussion of the thesis that these words would prevent Eisenhower from running for the Vice-Presidency, see Krock, *Loophole in Presidential Two-Term Limit*, N.Y. Times, Oct. 8, 1963, p. 42, col. 6; Krock, 'Ike for V.P.' Idea Perished 160 Years Ago, N.Y. Times, Oct. 10, 1963, p. 40, col. 6.

37. 1 Annals of Cong. 672 (1789).

38. *Id.* at 674. See also *id.* at 673-82.

39. Maclay, *The Journal of William Maclay* 72 (1927). See Field, *supra* note 9, at 374-75.

twelfth amendment political considerations rather than ability became all-important in the selection of a Vice-President. Senator White was remarkably perceptive when he said, during the debates on the amendment, that:

[C]haracter, talents, virtue, and merit, will not be sought after, in the candidate. The question will not be asked, is he capable? is he honest? But can he by his name, by his connexions, by his wealth, by his local situation, by his influence, or his intrigues, best promote the election of a President?⁴⁰

B. *Nineteenth Century Decline*

As predicted, the Vice-Presidency became, in the ensuing years, a very inferior and often disparaged office:⁴¹

The adoption of the Twelfth Amendment in 1804 marks a great turning point in the history of the Vice Presidency, and the turn was definitely for the worse Even without the Twelfth Amendment political party practice was pointing the Vice Presidency toward a decline. But by specifying that each elector would cast one ballot for President and a separate ballot for Vice President the amendment made the descent of the Vice Presidency clearer and more understandable.⁴²

Thus, Vice-Presidents in the nineteenth century rarely were given any executive responsibilities, although good relationships existed between Monroe and Gerry, Jackson and Van Buren, Polk and Dallas, Lincoln and Hamlin, and McKinley and Hobart.⁴³ They did not take part in meetings of the President's Cabinet⁴⁴ and their role as President of the Senate became little more than a pastime.⁴⁵ Few nineteenth century Vice-Presidents left any legacy for future occupants. The decline in the office was plainly revealed in 1840, when the Democratic National Convention failed to select any Vice-Presidential candidate at all to run

40. 13 Annals of Cong. 143 (1803). Some delegates thought that rather than have the twelfth amendment, the Vice-Presidency should be abolished. *Id.* at 673-74. For an excellent analysis of the background and the effect of this amendment, see Wilmerding, Jr., *The Vice Presidency*, 68 Pol. Sci. Q. 17 (1953). The author concludes that the reasons for creating the office were frustrated by the amendment and that the office should, therefore, be abolished. *Id.* at 41.

41. Its first occupant was to note the following in a letter to his wife: "My country has in its wisdom contrived for me the most insignificant office that ever the invention of man contrived or his imagination conceived." 1 Adams, *The Works of John Adams* 460 (1856 ed.). And its thirty-fourth was to say: "[W]hen I became Vice-President, I was familiar with incongruities and inadequacies of that office." 1 Truman, *op. cit. supra* note 27, at 53.

42. Waugh, *op. cit. supra* note 9, at 50.

43. See Rosenberg, *The Vice Presidency of the United States* 175-90 (1930) (unpublished thesis in University of California Library).

44. See note 54 *infra*.

45. Hatch & Shoup, *op. cit. supra* note 9, at 419.

with Van Buren.⁴⁶ In general, it can be said that the names of the nineteenth century Vice-Presidents—*e.g.*, Richard M. Johnson, George M. Dallas, William R. King, Hannibal Hamlin, Schuyler Colfax, Henry Wilson, William A. Wheeler, Thomas A. Hendricks, and Levi P. Morton⁴⁷—are wholly unfamiliar to most Americans.

A major nineteenth century development in the Vice-Presidency occurred upon the death of William Henry Harrison on April 4, 1841.

In upwards of half a century, this is the first instance of a Vice President's being called to act as President of the United States, and brings to the test that provision of the Constitution which places in the Executive chair a man never thought of for that office by anybody.⁴⁸

Considerable discussion was generated about the status of the then Vice-President, John Tyler. Did he become President? Or, did he remain Vice-President with the added responsibility of discharging the powers and duties of the Presidency? Tyler acted decisively, declaring that by God, election and the Constitution he had become President, in every sense.⁴⁹ Although he seems to have been of the opinion that he automatically succeeded to the Presidency upon the death of Harrison, he took the presidential oath in order to eliminate all doubt on the question.⁵⁰ But doubt remained in the minds of some. Said John Quincy Adams in his diary:

But it [Tyler's assumption of the title and office of the Presidency] is a construction in direct violation both of the grammar and context of the Constitution, which confers upon the Vice-President, on the decease of the President, not the office, but the powers and duties of the said office.⁵¹

Despite the objections, Tyler's assumption of the office established the precedent that when the President dies, the Vice-President becomes

46. Richard M. Johnson, the incumbent Vice-President at the time, was unable to obtain his party's renomination.

47. For a complete listing of our Vice-Presidents, see *Information Please Almanac* 568 (1964). In all, there have been thirty-seven Vice-Presidents. Seven have been elected for two terms—Adams, Clinton, Tompkins, Calhoun, Marshall, Garner, and Nixon—and six have become Presidents by election—Adams, Jefferson, Van Buren, T. Roosevelt, Coolidge, and Truman.

48. 10 Adams, *Memoirs of John Quincy Adams* 456-57 (1876).

49. See remarks of Representative Henry A. Wise of Virginia, *Cong. Globe*, 27th Cong., 1st Sess. 4 (1841). For the thesis that Tyler was wrong—that under the Constitution he remained Vice-President, acting as President—see Silva, *op. cit.* supra note 26.

50. Fraser, *Democracy in the Making* 158, 160 (1938) (*The Jackson-Tyler Era*). For an argument that he was not constitutionally required to take the presidential oath because succession was one of his constitutional duties for which he had already taken an oath, see Feerick, *supra* note 5, at 90 & n.84.

51. 10 Adams, *op. cit.* supra note 48, at 463-64.

President for the remainder of the term.⁵² The taking of the presidential oath also became a constitutional custom.⁵³

C. *Twentieth Century Growth*

Although Vice-Presidents Tyler, Fillmore, Johnson and Roosevelt had succeeded to the Presidency, the Vice-Presidency was not to undergo a "renaissance" until the twentieth century. In this century, the role of the Vice-President has steadily grown. He has become a regular member of the President's Cabinet,⁵⁴ a member of the National Security Council,⁵⁵ the head of some executive agencies,⁵⁶ a representative of

52. Despite this precedent, which has been given some recognition by the twentieth and twenty-second amendments, the death of an incumbent President usually evokes some discussion over the status of the then Vice-President. Hence the statement that "we probably have not had so many presidents as we have been accustomed to thinking." Field, *supra* note 9, at 385. See, e.g., Moley, *Is Truman Really President?*, *Newsweek*, July 14, 1947, p. 92. Shortly after the succession of President Lyndon B. Johnson, a southwestern attorney brought a lawsuit against him, seeking a determination that he is not President but rather Vice-President, acting as President.

53. See note 6 *supra*.

54. The practice of the Vice-President's participating in Cabinet meetings dates back to President George Washington. His Vice-President, John Adams, is reported to have taken part in a meeting on April 11, 1791. 1 *Writings of Thomas Jefferson* 278 (Bergh ed. 1907). See also Learned, *The President's Cabinet* 121-25 (1912). During the administration of John Adams, his Vice-President, Thomas Jefferson, did not participate in Cabinet meetings. "I consider my office as constitutionally confined to legislative functions, and that I could not take any part whatever in executive consultations, even were it proposed." 7 *Writings of Jefferson* 120 (Ford ed. 1896). Thus, it became customary for the Vice-President not to participate. Though there may have been times when Vice-Presidents did attend meetings of the Cabinet (see Paullin, *The Vice-President and the Cabinet*, 29 *Am. Hist. Rev.* 498 & nn.13 & 14 (1924)), no change in the custom was to occur until December 10, 1918, when Vice-President Thomas R. Marshall, at President Wilson's request, presided over a meeting of the Cabinet during the absence of Wilson and his Secretary of State from the country. Marshall presided over several meetings and when Wilson returned to the country, Marshall was invited to attend a meeting. *Id.* at 498-99. In the following administration, the then Vice-President, Calvin Coolidge, became a regular member of the Cabinet until President Harding's death. *Id.* at 500. Charles G. Dawes, President Coolidge's Vice-President, refused to attend Cabinet meetings, believing it politically and constitutionally "unwise." Hatch & Shoup, *op. cit. supra* note 9, at 45. Subsequent Vice-Presidents (Garner, Wallace, Truman, Barkley, Nixon and Johnson) have been regular members of the Cabinet. The most significant development happened during the administration of President Eisenhower, i.e., Vice-President Richard M. Nixon presided over the meetings of the Cabinet and National Security Council during the President's absence. See Donovan, *Eisenhower: The Inside Story* 378-85 (1956); Eisenhower, *Mandate For Change* 538, 540-41 (1963).

55. 61 Stat. 496 (1947), 50 U.S.C. 402 (1958). This development guards against the case of a Vice-President's being called to the Presidency in an emergency (e.g., Truman and the A-bomb) and not knowing vital facts about the Nation's security.

56. The precedent was established in 1941 by President Roosevelt who made his

the President on good will and diplomatic tours around the world,⁵⁷ and a sharer of some of the ceremonial and political functions of the President.⁵⁸ In short, he has become an informed, consulted and working member of the Government, adequately trained to assume the responsibilities of the Presidency, should the occasion require it.

D. *Proposed Changes*

The Vice-Presidency is still not above improvement. The practice of selecting vice-presidential candidates on the basis of political considerations rather than their qualifications for the Presidency persists.⁵⁹ Proposals to change this practice have been made from time to time but without any discernible effect.⁶⁰

Vice-President, Henry A. Wallace, chairman of the Economic Defense Board. Lord, *The Wallaces of Iowa* 484-85 (1947). Vice-President Nixon was made chairman of the President's Committee on Government Contracts. Williams, *The Rise of the Vice-Presidency* 248 (1956).

57. Again, the classic precedents were established by President Roosevelt and Vice-President Henry A. Wallace. Lord, *op. cit. supra* note 56, at 501-03. This role was carried forward by Vice-President Nixon and even further by President Johnson. For a good account of part of Johnson's tenure as Vice-President, see Fuller, *Year of Trial* 18-33 (1962).

58. See Nixon, *Six Crises* (1962). James Reston gives an interesting picture of President Johnson as Vice-President: "When he was Vice President, he had to discipline his energies. He had a limited catalogue of duties, limited for a man of his expansive nature. He stayed within the bounds of his assignment, seldom talked up in Cabinet meetings or the National Security Council unless requested to do so, and, in keeping with his sense of political loyalty, never differed with President Kennedy in the presence of anybody else." Reston, *Eisenhower to Johnson: Take It Easy*, N.Y. Times Jan. 12, 1964, § 4 (*The News of the Week in Review*), p. 12E, col. 3.

59. How Vice-President Nixon was selected is described by Eisenhower, *op. cit. supra* note 54, at 46-47. He says that he "had made in longhand a short 'eligible list' of those I thought both qualified and available." Nixon was the first of five names and was approved by a committee of close advisers to the President. Johnson's selection is recounted in Fuller, *op. cit. supra* note 57, at 6-8 ("Kennedy picked his second choice for President in 1960."). Recent Vice-Presidents have, indeed, been men of presidential timber but the system does not insure that this will be so in the future.

60. Committees of Congress have given much attention to proposals for selection of presidential and vice-presidential candidates on the basis of nationwide primaries. See, e.g., *Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 87th Cong., 1st Sess. (1961) (5 parts), 88th Cong., 1st Sess. (1963). Truman believes that nationwide primaries would be too expensive while former Vice-President Barkley believed that the candidates' own committees would probably bear the expense. Bendiner, *The Changing Role of the Vice-President*, *Colliers*, Feb. 17, 1956, p. 53. It has been suggested at times that the vice-presidential candidate be selected before the presidential candidate. This proposal would, it seems, discourage candidates of presidential timber from seeking the nomination as they probably would hold out for the presidential nomination. Another more serious objection is that it would permit the selection of a candidate whose views and personality would be incompatible with those of the presidential candidate. Former President Hoover has suggested a secret ballot instead of unit rule vote

Another area of possible reform is in the Vice-President's work load. While an enumeration of the President's powers and duties would literally fill reams of paper, those of the Vice-President can be briefly catalogued. In addition to being the presiding officer of the Senate,⁶¹ the Vice-President is a member of the National Security Council,⁶² chairman of the National Aeronautics Space Council,⁶³ chairman of the Committee on Equal Employment Opportunity,⁶⁴ and a member of the Board of Directors of the Smithsonian Institute (its presiding officer in the absence of the President).⁶⁵ He has the power to nominate a limited number of persons for appointment to the various military service academies,⁶⁶ and to administer oaths to executive officials.⁶⁷ His salary is \$35,000 a year, plus an expense allowance of \$10,000.⁶⁸

The ascendancy of the Vice-Presidency to its present height argues well for the future, but there is no escaping the fact that the extent of any Vice-President's role in our government will depend on his relationship with the President. Proposals to make his role more specific,⁶⁹

for Vice-President. Bendiner, *supra*. Other suggestions are that the presidential candidate either indicate several persons whom he would like to have on his ticket and then leave it to the Convention to decide among them, or express no preference at all and let the Convention decide (e.g., Kefauver and Kennedy in 1956). It has also been suggested that slates be presented to the Convention, or that the vice-presidential candidate be the one who has received the second highest number of votes for President. *Ibid*.

61. In his role as President of the Senate, history has shown that the Vice-President seldom presides over the Senate, that Presidents *pro tempore* seldom preside, and that the job of presiding is frequently given to junior Senators as they generally have more time. See *U.S. News & World Rep.*, June 26, 1953, p. 71, where Nixon stated that he spent less than 10% of his time at this role.

62. 63 Stat. 579 (1949), as amended, 50 U.S.C. § 402(a) (1958).

63. 75 Stat. 46 (1961), 42 U.S.C. § 2471 (Supp. IV, 1963).

64. Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961).

65. 9 Stat. 102, 103 (1846), 20 U.S.C. §§ 41, 45 (1958).

66. 10 U.S.C. §§ 4342, 6954, 9342 (1958).

67. 75 Stat. 743 (1961), 5 U.S.C. § 16a (Supp. IV, 1963).

68. 3 U.S.C. §§ 104, 111 (1958).

69. Some of the proposals which have been made over the years are as follows:

(1) The Vice-President should be given, in his role as President of the Senate, a vote on "ordinary occasions," a "voice in the debates" of the Senate, and the power to appoint committees of the Senate. T. Roosevelt, *The Three Vice-Presidential Candidates and What They Represent*, 14 *Review of Reviews* 289 (1896). Objection has been made to such proposals on the ground that they are contrary to the principle of equality of states and that the Vice-President might be from the minority party. Hatch & Shoup, *op. cit. supra* note 9, at 43.

(2) The Vice-President should be a liaison officer to Congress. F. Roosevelt, *Can the Vice President Be Useful?*, *Saturday Evening Post*, Oct. 16, 1920, p. 8. See Durham, *The Vice-Presidency*, 1 *Western Political Q.* 311, 314 (1948) (Vice-President as executive chairman of a legislative council which has "a leading role in the harmonization of legislative policy.").

their advantages aside, are not likely to be adopted. The recent proposal of Senator Kenneth B. Keating of New York that a constitutional amendment be enacted to provide for an executive Vice-President who would be first in the line of succession, as well as a legislative Vice-President, who would be second in line and President of the Senate, has met with some support but even greater opposition.⁷⁰ Former Vice-President Nixon summarily dismissed it, saying that by dividing "the already limited functions of the office, we would be downgrading the vice presidency at a time when it is imperative that we add to its prestige and importance."⁷¹ To this can be added the objection that having two Vice-Presidents might well result in neither one being as adequately prepared as were Vice-Presidents Nixon and Johnson to assume the powers and duties of the Presidency in cases of emergency. A Vice-President devoted exclusively to administrative problems leaves much to be desired when one considers the present-day requirements for the Presidency. As our late President stated:

[T]here is such a difference between those who advise or speak or legislate [or administer], and between the man who must select from the various alternatives proposed and say that this shall be the policy of the United States.⁷²

(3) The Vice-President should be given more administrative responsibilities. Menez, *Needed: A New Concept of the Vice-Presidency*, 30 *Social Science* 143, 149 (1955) ("The Vice-President must become the Assistant President."); Rossiter, *The Reform of the Vice-Presidency*, 63 *Pol. Sci. Q.* 383, 394 (1948) ("[T]he President's chief assistant in the overall direction of the administrative branch"). See also Bush, *Needed—A Business Manager*, *Colliers*, March 13, 1920, p. 13; *U.S. News & World Rep.*, July 9, 1948, pp. 19-20. During the 1956 Senate hearing on the proposal to create a position of administrative Vice-President, Clark Clifford, assistant to both Presidents Truman and Kennedy, suggested that the Vice-President could truly become the second officer in the Government if he were moved to the executive branch. This, he recognized, would require a constitutional amendment but only by becoming a "day-by-day working assistant to the President," he said, would he really be prepared for the Presidency. *Hearings Before the Subcommittee on Reorganization of the Senate Committee on Government Operations*, 84th Cong., 2d Sess. 57 (1956).

(4) Some have suggested the abolition of the office of Vice-President altogether. See note 40 *supra*. Wilmerding suggests that if the President were to die, be removed, or resign, the Secretary of State would act as President until the holding of a midterm election to fill the vacancy. In cases of inability, he would act until the inability was removed. Wilmerding, *The Presidential Succession*, *Atlantic Monthly*, May 1947, p. 91. See Hazlitt, *The Vice Presidency*, *Newsweek*, Dec. 2, 1963, p. 86.

See generally Field, *The Vice Presidency of the United States*, 56 *Am. L. Rev.* 365, 398-400 (1922); Rossiter, *The Reform of the Vice-Presidency*, 63 *Pol. Sci. Q.* 383, 387-89 (1948).

70. S.J. Res. 143, 88th Cong., 2d Sess. (1964). A similar proposal was introduced several years ago by Senator Monroney. For a good discussion of his proposal, see Rossiter, *supra* note 69, at 391-93.

71. Nixon, *We Need a Vice President Now*, *Saturday Evening Post*, Jan. 18, 1964, p. 6.

72. *Public Papers of the Presidents of the United States, 1962*, at 889 (U.S. Gov't Printing Office, 1963).

Prudence would seem to dictate that the twentieth century growth of the Vice-Presidency be in no way nullified.

II. PRESIDENTIAL SUCCESSION

The aftermath of President Kennedy's death has seen renewed discussion and much criticism of the present succession law.⁷³ Some of the discussion has, unfortunately, centered on the personalities who are now in line of succession rather than on what might be the best kind of law.⁷⁴ The criticisms of personalities aside, it is argued that the 1947 law is unconstitutional.⁷⁵ The Speaker of the House of Representatives and the President pro tempore of the Senate, it is said, are not "officers" within the meaning of the succession clause and, even if they are, Congress has no power to authorize them to act after they have resigned from their respective offices—which the present law requires them to do preparatory to acting as President. The 1947 law is said to be impractical since the Speaker and President pro tempore are not chosen on the basis of their qualifications for the Presidency and since it allows a political party different from that of the President and Vice-President to take over after them. Hence the demand for change. Former President Dwight D. Eisenhower has expressed a preference for the old Cabinet line of succession, observing that the present law does not fulfill "the requirements of our times."⁷⁶ Former Vice-President Richard M. Nixon has said he is in favor of filling a vacancy in the Vice-Presidency, noting that the "vice presidency . . . is the only office which provides complete on-the-job training for the duties of the presidency."⁷⁷

Should the 1947 law be changed? If so, how? An examination of the constitutional background and history of the three succession laws provides some understanding of the strengths and weaknesses of the present law.

A. *The Constitutional Provision and the 1792 Law*

On August 27, 1787, Hugh Williamson of Delaware suggested to the Constitutional Convention that "the Legislature ought to have power to

73. See note 3 *supra*. For an extremely interesting panel discussion on the general subject, see CBS Reports, Transcript of "The Crisis of Presidential Succession," Jan. 8, 1964.

74. See Finney, *Line Of Succession*, N.Y. World-Tel. & Sun, Dec. 27, 1963, p. 21, cols. 3-7; Viorst, *Next in Line for the Presidency*, N.Y. Post, Dec. 8, 1963, § 2 (Magazine), p. 5; U.S. News & World Rep., Dec. 30, 1963, p. 26 ("Size-Up of New 'Vice President'"). See also Albright McCormack, *Hayden Won't Quit*, Wash. Post, Dec. 12, 1963, p. 1, cols. 4-7.

75. 3 U.S.C. § 19 (1958).

76. Eisenhower, *When the Highest Office Changes Hands*, Saturday Evening Post, Dec. 14, 1963, p. 15.

77. Nixon, *supra* note 71, at 10.

provide for occasional successors"⁷⁸ His suggestion was acted upon on September 7 when the following provision was agreed to:

The Legislature may declare by law what officer of the U.S.—shall act as President in case of the death, resignation, or disability of the President and Vice-President; and such officer shall act accordingly until such disability be removed, or a President shall be elected.⁷⁹

This provision, with some changes, became embodied in article II, section 1, clause 6 of the Constitution.⁸⁰ Pursuant to this power, Congress made the first attempt to set up a line of succession beyond the Vice-President on December 20, 1790. A bill was presented to provide that an officer, the name of which was left blank, shall act as President when there are vacancies in the offices of President and Vice-President.⁸¹ On January 10, 1791, motions were made to name the officer variously as the Secretary of State, the Chief Justice, the President pro tempore and the Speaker.⁸² The discussion concluded on January 13 without any consensus having been reached and with some of the delegates remarking that there was no need for immediate action.⁸³

In the Second Congress, on November 15, 1791, a Senate committee reported a bill dealing with the choice of presidential electors. On November 23, the bill was returned to the committee which was "instructed to report a clause, making provision for the administration of Government, in case of vacancies in the offices of President and Vice President."⁸⁴ The bill was reported on November 28 and was passed by

78. 2 Farrand 427.

79. The words "until such disability be removed, or a President shall be elected" were inserted on the motion of James Madison so as to permit a special election for filling a vacancy in the office of President. Significantly, at the Virginia Ratifying Convention, James Madison answered an objection of George Mason that the Constitution had no special election provision with these words: "When the President and Vice President die, the election of another President will immediately take place; and suppose it would not, all that Congress could do would be to make an appointment between the expiration of the four years and the last election, and to continue only to such expiration." 3 Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 487-88 (1881 ed.).

80. As will be noted from a reading of this clause (see text accompanying note 1 *supra*), the expression "officer of the U.S." was shortened to "officer" and the semicolon was deleted.

81. 2 Annals of Cong. 1860 (1790).

82. *Id.* at 1902. James Madison objected to the Chief Justice on the ground that there would be a blending of the executive and judiciary. He objected to the President pro tempore on the ground that as a Senator, he would be subject to instruction by his state and would also be holding two offices. In his opinion, the best successor was the Secretary of State. *Id.* at 1904. See note 97 *infra*.

83. *Id.* at 1914-15.

84. 3 Annals of Cong. 31 (1791).

the Senate on November 30. Little is known as to what transpired in the Senate because its debates were not reported at the time. Section 9 of the bill named the President pro tempore and Speaker, respectively, as the successors. The bill was referred to the House on November 30, and it came under scrutiny by the Committee of the Whole on December 22.⁸⁵ On that day, a motion to eliminate section 9 entirely was made and defeated. Then a motion to remove the President pro tempore and Speaker from the line of succession was made. It was defeated on January 2, 1792.

In Committee, feeling was strong that neither the President pro tempore nor the Speaker was an officer in the sense contemplated by the Constitution.⁸⁶ Representative Giles declared that "if they had been considered as such, it is probable they would have been designated in the Constitution; the Constitution refers to some permanent officer to be created pursuant to the provisions therein contained."⁸⁷ Some felt that they were officers. "If the Speaker is not an officer," said Representative Gerry, "what is he?"⁸⁸ Gerry, however, objected to section 9 because it blended the executive and legislative branches of the Government. Representative Hillhouse registered a general objection to any provision by which the President could appoint his own successor since it would take "away the choice from the people . . . violating . . . the first principle of a free elective Government."⁸⁹

On January 2, 1792, the Committee of the Whole reported the bill to the House. A motion to strike out the President pro tempore was narrowly defeated⁹⁰ while one to strike out the Speaker was carried.⁹¹ As a result, the bill was laid on the table. On January 6,⁹² it was returned to the Committee of the Whole. The Committee considered it on February 9, at which time the President pro tempore was removed

85. Id. at 278.

86. In the First Congress, Representative White had advanced this argument with which Representative Sherman had disagreed. 2 id. at 1902-03 (1790).

87. 3 id. at 281 (1791). In agreement were Representatives Giles, Sturges, White and Williamson. Said Williamson: "[T]his extensive construction of the meaning of the word officer, would render it proper to point out any person in the United States, whether connected with the Government or not, as a proper person to fill the vacancy contemplated." Ibid.

88. Ibid.

89. Ibid.

90. The vote was 27 nays and 24 yeas. Included among the yeas were four delegates to the Constitutional Convention—Baldwin, Fitzsimons, Madison and Williamson. The nays had only two—Gerry and Gilman. Id. at 303.

91. The vote was 26 to 25. In favor of it were the following delegates to the Constitutional Convention: Baldwin, Fitzsimons, Gerry, Madison and Williamson.

92. Id. at 315.

from the line of succession. On the next day, the Secretary of State was added.⁹³ The House concurred in the substitution and the bill was passed.⁹⁴

In the Senate, the House amendment was rejected: the President pro tempore and Speaker were again inserted and the Secretary of State removed. The Senate's opposition to having the Secretary of State next in line after the Vice-President is said to have been due to Alexander Hamilton's dislike of the then Secretary of State, Thomas Jefferson.⁹⁵ Since Hamilton's influence in the Senate was great, he was able to have his own way. Thus, on February 21, the bill was returned to the House. The House withdrew its amendment⁹⁶ and the bill became law on March 1, 1792, with the signature of President George Washington.⁹⁷ For the next ninety-four years, the President pro tempore and Speaker were the only successors after the Vice-President. During that time, four Presidents and five Vice-Presidents died in office.⁹⁸ These vacancies occurred in singles so that the 1792 law was never employed.⁹⁹

93. *Id.* at 401. A motion to add the senior Associate Justice was not passed.

94. *Id.* at 402. Baldwin, Fitzsimons, Gilman, Madison and Williamson voted for it, while Gerry voted against it.

95. See 3 Rives, *History of the Life and Times of James Madison* 223 (1868); 8 *Works of Alexander Hamilton* 261 (Lodge ed. 1886); 1 *Works of Fisher Ames* 114 (1854).

96. 3 *Annals of Cong.* 417 (1791). Three delegates to the Constitutional Convention—Dayton, Fitzsimons and Gerry—favored the withdrawal. Four did not—Baldwin, Gilman, Madison and Williamson.

97. 1 *Stat.* 239 (1792). It should be noted that section 10 of the act provided that whenever the offices of President and Vice-President became vacant, the Secretary of State was to notify the Governor of every state that electors were to be appointed within thirty-four days prior to the first Wednesday of the ensuing December. If less than two months remained before that date and if the term of the last President and Vice-President were not to end in the following March, the election would take place in December in the year next ensuing. If the term were to end in March, no election at all would take place.

Shortly after the law of 1792 was passed, Madison wrote Edmund Pendleton (Governor of Virginia) a letter in which he expressed his opposition to the act. He stated, in part, that either the Speaker or President pro tempore "will retain their Legislative stations, and then incompatible functions will be blended; or the incompatibility will supersede those stations, & then those being the substratum of the adventitious functions, these must fail also. The Constitution says Congress may declare what officers, &c., which seems to make it not an appointment or a translation, but an annexation of one office or trust to another office." 6 *Writings of James Madison* 95 n.1 (Hunt ed. 1906).

98. See notes 6 and 7 *supra*.

99. A double vacancy almost occurred on February 28, 1844. President Tyler and several members of his Cabinet were aboard a ship when an explosion occurred, killing the Secretaries of State and Navy. Tyler narrowly escaped with his life.

B. The 1886 Law

Dissatisfaction with the Act of 1792 reached a peak in the 1880's. On September 19, 1881, President James A. Garfield died from gunshot wounds inflicted eighty days earlier and Vice-President Chester A. Arthur succeeded to the Presidency. The country was again left without a Vice-President and, shockingly, for a time without any successor at all to Arthur. This was because Congress was out of session at the time of Garfield's death and the new Congress was not due to convene until December. Hence, there was no Speaker¹⁰⁰ and, since Arthur had presided at the last session of the Senate, there was no President pro tempore.¹⁰¹ On November 25, 1885, Vice-President Hendricks died, again at a time when Congress was not in session. As in Arthur's case, for a time there was no successor to President Cleveland.¹⁰²

These events generated a considerable amount of discussion in Congress during the years 1881-1886 regarding the problems of succession and inability.¹⁰³ Said Senator Jones during an early discussion:

[N]othing can be of greater importance to the American people or their representatives in Congress than those discussions of the fundamental law which may possibly

100. Prior to the adoption of the twentieth amendment, the terms of all Members of the House of Representatives expired on March 4 of the odd years. Thus, there would be a vacancy in the office of Speaker until the next Congress met (usually in the following December) and elected a Speaker. The twentieth amendment (ratified Feb. 6, 1933) provided that terms of Senators and Representatives would begin on January 3 instead of March 4, and that the regular sessions of Congress would begin at the same time. Thus, now there would normally be only a brief period during which a vacancy would exist in either the office of Speaker or President pro tempore—i.e., the time between January 3 and election of a Speaker or President pro tempore. See generally 93 Cong. Rec. 7711 (1947) (remarks of Senator Wherry).

101. See 12 Cong. Rec. 505 (1881). The Senate practice at the time was to elect a President pro tempore only when the Vice-President was absent. It was customary for the Vice-President to absent himself from the Senate in its closing sessions so that a President pro tempore could be elected to hold office until the next session. In this case, however, the Senate was closely divided and Vice-President Arthur's tie-breaking vote was required. Thus, he presided and no President pro tempore was chosen. 11 *id.* at 465-71 (1881). Since March 12, 1890, the Senate has elected its President pro tempore to hold office continuously (at the pleasure of the Senate) regardless of absences of the Vice-President. Thus, this situation would no longer be possible. 21 *id.* at 2153 (1890).

102. Hendricks had presided at a special session of the Senate in March to confirm presidential nominations so that no President pro tempore was elected. 17 *id.* at 1 (1885).

103. It should also be noted that another event which added to the criticism of the law of 1792 was the impeachment of President Johnson. Since he had succeeded to the Presidency upon the death of Lincoln, there was no Vice-President. Benjamin Wade of Ohio was President pro tempore of the Senate and next in line to succeed to the Presidency. When the Senate tried Johnson, Wade, who would succeed if Johnson were convicted, sat as a judge on the court of impeachment and voted "guilty." D. M. Dewitt,

have the effect of clearing away some of the doubts which surround this grave and important subject.¹⁰⁴

In the discussions to follow, numerous objections to the law of 1792 were advanced.¹⁰⁵ As noted above, one was the possibility that there might be no President pro tempore or Speaker.¹⁰⁶ It was argued time and again, particularly by Senators Hoar,¹⁰⁷ Maxey,¹⁰⁸ Beck¹⁰⁹ and Garland,¹¹⁰ that the President pro tempore and the Speaker were not officers under the succession provision but merely officers of their respective Houses or states.¹¹¹ James Madison was cited as an authority for this proposition,¹¹² as was the classic *Blount* decision,¹¹³ which has been interpreted as holding that a Member of Congress is not a civil officer of the United States. Parts of the Constitution itself were cited in support of this position.¹¹⁴ An officer under the succession provision, it

The Impeachment and Trial of Andrew Johnson 553 (1903). Johnson was acquitted by one vote. Senator Evarts said during the debates that the Constitution would never permit the House to impeach and the Senate to convict and then replace the President with one of their own members. 17 Cong. Rec. 250 (1885).

104. 13 id. at 141 (1881).

105. For a good historical review of the law of 1792 and some pertinent criticisms, see letter from D. F. Murphy, Official Reporter United States Senate, to Senator James B. Beck, dated July 14, 1881, in 13 Cong. Rec. 126 (1881) (remarks of Senator Beck). See also 93 id. at 7768-71 (1947) (remarks of Senator Hatch); 17 id. at 214-15 (1885) (remarks of Senator Maxey); 14 id. at 876-79 (1883) (remarks of Senators Hoar & Garland); Corwin, *The President: Office and Powers* 56-57 (1940).

106. See 13 Cong. Rec. 121 (1881) (remarks of Senator Beck); 14 id. at 876 (1883) (remarks of Senator Hoar); 17 id. at 216 (1885) (remarks of Senator Maxey); 17 id. at 686 (1886) (remarks of Senator Dibble).

107. See his remarks at 14 id. at 688-89, 876-77 (1882); id. at 965 (1883).

108. See his remarks at 13 id. at 129-33, 139 (1881); 14 id. at 913 (1883); 17 id. at 214-16 (1885).

109. See his remarks at 13 id. at 122 (1881); 14 id. at 954 (1883); 17 id. at 220-21 (1885).

110. See his remarks at 13 id. at 137-139 (1881); 14 id. at 878 (1883).

111. For similar remarks of other Senators, see 13 id. at 128 (1881) (Beck); 17 id. at 224 (Morgan), 250 (Evarts) (1885); 17 id. at 684 (Dibble), 687 (Baker), 688 (Ryan) (1886).

112. See note 97 *supra*. See remarks at 14 id. at 877 (Senator Hoar), 913 (Senator Maxey) (1883); 17 id. at 688 (1886) (Senator Ryan).

113. 8 Annals of Cong. 2245-415 (1798). Blount was impeached by the House. When he was tried in the Senate, Jared A. Ingersoll and A. J. Dallas, who represented him, pleaded lack of jurisdiction on the grounds that a Senator was not a civil officer and thus not subject to impeachment. The Senate dismissed the case, giving no reason for its decision.

U.S. Const. art. II, § 4 provides: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction . . ."

114. See U.S. Const. art. II, § 1, cl. 2, where a distinction is made between Senators and Representatives and Officers: "[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States . . ."; and U.S. Const. amend. XIV,

was said, was an officer of the United States, a permanent officer, one who receives his commission from the President. Even if the President pro tempore and Speaker were such officers, it was urged, the Constitution would still prevent them from acting as President because of the provision that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."¹¹⁵ The law of 1792 did not require the officer acting as President to resign¹¹⁶ but, if it had, it would still have been objectionable because the function of acting as President must be added to an existing office.¹¹⁷ If the President pro tempore or Speaker resigned, he would have no office to which the function of acting as President could be attached. On the other hand, it was said that if he did not resign, there would be a violation of the principle of separation of powers¹¹⁸ as he would be the presiding officer of his House and thus entitled to vote and debate on measures.¹¹⁹ In addition, his tenure as acting President would be subject to the will of his respective House¹²⁰ and it could come to an abrupt end if he lost his legislative seat at the polls.¹²¹

Most of the critics of the 1792 law favored a Cabinet line of succession,¹²² believing that there would be no doubt about their status as

§ 3: "No person shall be a Senator or Representative in Congress . . . or hold any office, civil or military, under the United States . . ."

It was also argued (14 Cong. Rec. 913 (1883) (remarks of Senator Maxey)) that the President pro tempore is not even an officer of the Senate by virtue of U.S. Const. art. I, § 3, cl. 5: "The Senate shall chuse their other Officers, and also a President pro tempore . . ."

115. U.S. Const. art. I, § 6, cl. 2.

116. The law was apparently based on the premise that the Speaker and President pro tempore were not eligible to act as President unless they retained their offices while so acting.

117. See remarks at 14 Cong. Rec. 689 (1882) (Senator Hoar), 954 (1883) (Senator Dawes); 17 id. at 250 (1885) (Senator Evarts), 687 (1886) (Senator Baker), 688 (1886) (Senator Ryan). "[T]he Presidency is annexed by law to an office. It is not a person holding an office at the time succeeding to the Presidency, but it is an officer continuing in that office who is to perform as an annex or incident merely to another office the great duties of the Presidency itself." 14 id. at 689 (1882) (remarks of Senator Hoar).

118. See the remarks at 14 id. at 878 (Senator Garland), 954 (Senator Beck), 954 (Senator Dawes) (1883); 17 id. at 214 (Senator Maxey), 248-50 (Senator Evarts) (1885); 17 id. at 684 (Senator Dibble), 687 (Senator Baker), 688 (Senator Ryan) (1886).

119. See the remarks at 14 id. at 954 (Senator Beck), 955 (Senator Dawes) (1883); 17 id. at 684 (Senator Dibble), 688 (Senator Ryan) (1886).

120. See the remarks at 14 id. at 689 (1882) (Senator Hoar); 17 id. at 250 (1885) (Senator Evarts); 17 id. at 684 (Senator Dibble), 687 (Senator Baker), 689 (Senator Ryan) (1886).

121. See the remarks at 13 id. at 123 (Senator Beck), 138 (Senator Garland) (1881); 14 id. at 883-84 (Senator Morgan), 954 (Senator Beck) (1883).

122. See the remarks at 13 id. at 137 (1881) (Senator Garland); 17 id. at 216 (Senator Maxey), 248 (Senator Evarts) (1885); 17 id. at 684, 686 (Senator Dibble), 688 (Senator Baker) (1886).

officers,¹²³ that there would be continuity of administration and policy,¹²⁴ and that the Secretary of State would be far better qualified for the Presidency than either the President pro tempore or Speaker.¹²⁵ Opposition to setting up a Cabinet line of succession centered on the points that the original law was written by the Founding Fathers,¹²⁶ and that the President would be able to appoint his own successor, which would be contrary to the elective principle of our democracy.¹²⁷

The arguments for a Cabinet line of succession and against the law of March 1, 1792 prevailed with the adoption of the Act of January 19, 1886.¹²⁸ The act removed the President pro tempore and the Speaker from the line of succession and added the heads of the executive departments, as follows: Secretary of State, Secretary of Treasury, Secretary of War, Attorney General, Postmaster General, Secretary of Navy and Secretary of Interior.

Some of the advocates of the 1886 law criticized the special election provision of the Act of 1792 on the grounds that it was unwise¹²⁹ or even unconstitutional.¹³⁰ Yet, the words "until another President shall be elected" were nonetheless inserted in the 1886 Act, together with a proviso that the Cabinet successor would have to call Congress into session within twenty days after succeeding if it were not then in session. It would thus be left to Congress to decide whether or not to call a special election.¹³¹

123. See the remarks at 14 *id.* at 956 (1883) (Senator Sherman); 17 *id.* at 216 (1885) (Senator Maxey).

124. See the remarks at 14 *id.* at 688-89 (Senator Hoar), 954 (Senator Beck), 955 (Senator Dawes) (1882); 17 *id.* at 686 (1886) (Senator Dibble).

125. See the remarks at 14 *id.* at 689 (1882) (Senator Hoar), 878 (1883) (Senator Garland), 915 (1883) (Senator Maxey).

126. See the remarks at 17 *id.* at 670 (1886) (Senator Peters). For a good answer to this objection, see 17 *id.* at 216 (1885) (remarks of Senator Maxey).

127. See the remarks at 14 *id.* at 690 (1882) (Senator Edmunds), 956 (1882) (Senator Dawes), 960 (1883) (Senator Ingalls); 17 *id.* at 686 (1886) (Senator Osborne).

128. 24 Stat. 1 (1886).

129. See the remarks at 14 Cong. Rec. 689 (1882) (Senator Hoar), 954 (1883) (Senator Beck); 17 *id.* at 216 (1885) (Senator Maxey), 688 (1886) (Senator Baker).

130. See the remarks at 14 *id.* at 916 (1883) (Senator Maxey); 17 *id.* at 224 (1885) (Senator Morgan) (the words "shall be elected" in the Constitution mean every four years), 248 (1885) (Senator Evarts), 685 (1885) (Senator Dibble), 690 (1886) (Senator Ryan). For views that special elections were intended, see 14 *id.* at 690 (1882) (Senator Edmunds), 921 (1882), 955 (1883) (Senator Dawes). See also 14 *id.* at 957 (1883) (Senator Sherman); 17 *id.* at 224 (1885) (Senator Teller).

131. The feature which provides that the acting President serves "until another President shall be elected" is severely criticized in Hamlin, *The Presidential Succession Act of 1886*, 18 Harv. L. Rev. 182 (1905). The author takes the position that these words are both confusing and unwise in that the tenure of the successor is not defined (i.e., whether or not it is for the rest of the presidential term) and that they would allow Congress to harass the

From 1886 to 1945, three Presidents and two Vice-Presidents died in office.¹³² The vacancies again occurred in singles so that the Act of 1886 was never resorted to.

C. *The 1947 Law*

After the death of President Franklin D. Roosevelt on April 12, 1945 and the succession of Vice-President Harry S. Truman to the Presidency, criticism of the the 1886 Act manifested itself. In a special message to Congress on June 19, 1945, President Truman declared:

[B]y reason of the tragic death of the late President, it now lies within my power to nominate the person who would be my immediate successor in the event of my own death or inability to act.

I do not believe that in a democracy this power should rest with the Chief Executive.

Insofar as possible, the office of the President should be filled by an elective officer. There is no officer in our system of government, besides the President and Vice President, who has been elected by all the voters of the country.

The Speaker of the House of Representatives, who is elected in his own district, is also elected to be the presiding officer of the House by a vote of all the Representatives of all the people of the country. As a result, I believe that the Speaker is the official in the Federal Government, whose selection next to that of the President and Vice President, can be most accurately said to stem from the people themselves.¹³³

In placing the Speaker ahead of the President *pro tempore*, President Truman stated that the Members of the House are closer to the people than those of the Senate since they are elected every two years and thus the Speaker would be closer than the President *pro tempore*. He recommended that whoever succeeds after the Vice-President should serve only until the next congressional election or a special election to elect a President and Vice-President.

On June 25, 1945, Representative W. Sumners of Texas introduced a bill¹³⁴ embodying the President's recommendations, adding the Speaker and President *pro tempore*, respectively, to the top of the cabinet line of succession. It was debated briefly in the House on June 29, in which debate Representatives Kefauver,¹³⁵ Robsion, Sumners, Reed, Mich-

acting executive, should it choose to do so. Cf. Silva, *The Presidential Succession Act of 1947*, 47 Mich. L. Rev. 451, 472-75 (1949).

132. See notes 6 and 7 *supra*. It is to be noted that the Republican candidates for office in 1940, i.e., Wendell L. Willkie and Charles McNary, both had died before the term of Roosevelt and Wallace had ended.

133. 91 Cong. Rec. 6272 (1945).

134. H.R. 3587, 79th Cong., 1st Sess. (1945).

135. "I shall not elaborate upon the arguments which we are all familiar with; that he is closer to the people; that he has much governmental experience; that he has been honored by his colleagues who are the direct representatives of the people. I think we should also bear in mind that the Speaker of the House of Representatives is an official who, if he

ener¹³⁶ and Monroney¹³⁷ expressed support for the bill. The passage of the first succession law and the long acquiescence therein, the Supreme Court's decision in *Lamar v. United States*,¹³⁸ and parts of the Constitution itself were referred to in support of the contention that a law placing the Speaker and the President pro tempore in the line of succession would be constitutional.¹³⁹ Representatives Gwynne, Hancock and Springer argued that the Speaker and President pro tempore were not officers under the succession clause.¹⁴⁰ The special election feature of the Sumners bill was attacked by Representative Robsion.¹⁴¹ He stated that it would require conforming changes in the state election laws and even in some state constitutions. Joined by Representatives

should become Acting President, would know how to get along with the Congress. He is bound to have experience in government which would qualify him for that position." 91 Cong. Rec. 7016 (1945).

136. "[A] Speaker . . . is always a man who has on numerous occasions been selected by the people, a man with legislative as well as executive experience, a man in a position to cooperate with the Congress, a very essential factor in the picture of Government at all times. . . . As between being governed by a bureaucrat or an 'heir apparent to the throne' selected by any Executive, I much prefer as our President a man elected by the people themselves. This is representative democracy and should be adhered to in this particular case, unless there is constitutional prohibition, and I do not believe there is." 91 Cong. Rec. 7011 (1945).

137. "I believe he was very wise in recommending that the Speaker of the House is the nearest possible officer to express the maximum representative choice of the people at the most recently held national election that it is possible to find in our Government." 91 Cong. Rec. 7012 (1945).

138. 241 U.S. 103 (1916). In that case, the Court held that a Member of the House of Representatives was an officer of the Government within the meaning of a penal statute making it a crime for one to impersonate an officer of the Government. The Court was careful to note that the issue presented was not a constitutional one. In the course of its opinion, the Court stated: "[W]hen the relations of members of the House of Representatives to the Government of the United States are borne in mind and the nature and character of their duties and responsibilities are considered, we are clearly of the opinion that such members are embraced by the comprehensive terms of the statute." *Id.* at 112.

The *Lamar* decision has been construed by several state courts as holding that a Member of Congress is a United States officer and not a state officer. See, e.g., *State ex rel. Pickrell v. Senner*, 92 Ariz. 243, 375 P.2d 728 (1962); *Harless v. Lockwood*, 85 Ariz. 97, 332 P.2d 887 (1958); *State ex rel. Carroll v. Becker*, 329 Mo. 501, 45 S.W.2d 533 (1932); *Ekwall v. Stadelman*, 146 Ore. 439, 30 P.2d 1037 (1934). For Attorney General opinions that Members of Congress are officers of the United States, see 93 Cong. Rec. 8621-22 (1947) (Acting Attorney General McGregor); 17 Ops. Att'y Gen. 419 (1882) (Attorney General Brewster).

139. Representative Kefauver argued that U.S. Const. art. I, § 2, cl. 5, which provides: "The House of Representatives shall chuse their Speaker and other Officers . . .," shows that the Speaker is an officer. See generally 91 Cong. Rec. 7008-28 (1945).

140. *Id.* at 7015, 7017-18, 7022.

141. *Id.* at 7010. As reported, the bill provided for a special election to fill vacancies in the offices of President and Vice-President if such should occur ninety days or more before the mid-term congressional elections.

Kefauver,¹⁴² Monroney¹⁴³ and Reed,¹⁴⁴ Robsion was successful in eliminating the provision altogether.¹⁴⁵ As amended, the Sumners bill passed the House and was forwarded to the Senate, where it became pigeonholed in committee.

The 1946 congressional elections brought a different party from that of the President into the majority in Congress.¹⁴⁶ President Truman, however, still asked Congress for action on his succession recommendations, despite the fact that their enactment would place a Republican Speaker in the line of succession.¹⁴⁷ Finally, in June 1946, the Senate gave serious thought to a bill (similar to that of Sumners) which had been introduced several months before by Senator Wherry.¹⁴⁸ Unlike the Sumners bill, it contained no special election provision and it expressly required the Speaker and President pro tempore to resign from Congress before they could act as President.¹⁴⁹ In the Senate debates, Senator Hatch argued at length that the Speaker and President pro tempore were not officers, that if an officer resigns his office he can not act as President, that it would violate the principle of separation of powers for a Member of Congress to act as President, and that a

142. He stated: "[I]t probably would upset things too much within a period of 4 years to have four people fill the office of President—the President, the Vice President, the Speaker of the House—and then have an election to get the fourth person." *Id.* at 7017.

143. "I feel that the Speaker should continue to fill that unexpired term of the Presidency in order to avoid creating disunity and division which always occurs in a national election at a time when we would need the greatest unity in our country." *Id.* at 7013. He went on to point out that a special election law passed at a time when one was acting as President could be vetoed by that person.

144. Such a provision, he said, was "impractical . . . cumbersome . . . expensive and of doubtful constitutionality." *Id.* at 7020.

145. *Id.* at 7024-25. The provision was believed by some to be unconstitutional (see, e.g., *id.* at 7022 (remarks of Representative Springer)). See notes 129-30 *supra*.

146. In 1945, the Speaker was Sam Rayburn, one of the country's ablest public servants. In a sense, a vote for the Sumners bill was considered a vote for Rayburn. In 1946, Joseph W. Martin, Jr., of Massachusetts became Speaker. This further background should be noted: When Truman became President, Edward R. Stettinius, Jr., was Secretary of State. It was felt by many Members of Congress that "he had not had sufficient governmental experience to exercise the duties of President." 25 Cong. Dig. 67 (1946). On June 27, Stettinius resigned his position, and on July 3, former Senator James E. Byrnes was appointed as his successor. Interest in adopting a new law waned. See S. Con. Res. 50, 79th Cong., 2d Sess. (1946), which looked to setting up a committee of Members of both Houses to study the problems involved. It was never adopted by the House.

147. See Letter from President Truman to President pro tempore Vandenberg and Speaker Martin, Feb. 5, 1947, in 93 Cong. Rec. 7693 (1947).

148. S. 564, 80th Cong., 1st Sess. (1947).

149. The Sumners bill was not clear on this point. During the House debates on the Sumners bill, Representative Judd argued that the Speaker and President pro tempore did not have to resign because they would not be holding any office but merely acting as President. 91 Cong. Rec. 7027 (1945).

Speaker or President pro tempore is not elected on the basis of his qualifications for the Presidency.¹⁵⁰ Some felt that the Wherry bill represented piecemeal legislation and that it should be given further consideration in committee.¹⁵¹ An amendment which would place the President pro tempore ahead of the Speaker was proposed by Senator Russell.¹⁵² It was narrowly defeated, largely because of Senator Vandenberg, the then President pro tempore, who argued that the Speaker was "the officer reflecting the largest measure of popular and representative expression at the instant moment of his succession."¹⁵³ A proposed amendment by Senator McMahon regarding a provision for a special election was defeated,¹⁵⁴ as was an amendment by Senator Wiley to add the highest ranking military or naval officers to the line of succession after the Cabinet heads.¹⁵⁵ The bill was finally put to a vote and it passed by a vote of 50 to 35.¹⁵⁶ It passed the House on July 10 by a vote of 365 to 11¹⁵⁷ and became law on July 18, with President Truman's signature.

The 1947 law provides that "if, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President then the Speaker . . . shall, upon his resignation as Speaker and as Representative in Congress, act as President."¹⁵⁸ If there is no Speaker at the time, then the President pro tempore shall act as President, upon his resignation as President pro tempore and as Senator.¹⁵⁹ If either the Speaker or President pro tempore acts, he

150. See 93 Cong. Rec. 7767-70 (1947) for an excellent presentation of these arguments by the Senator.

151. *Id.* at 7776-77. That the Speaker and President pro tempore would have to resign their offices and membership in Congress before they could act in a case of inability, even if it were to be for a day, was objected to. *Id.* at 7774.

152. *Id.* at 7780.

153. *Id.* at 7781. The vote was 55 to 31.

154. *Id.* at 7783-84. McMahon's proposal provided for the election, by the last electoral college, of a new President and Vice-President, where vacancies in these offices occurred 120 days or more before the end of the term. Senator Wherry objected to the amendment on the grounds that Congress had no special election authority, that the Constitution provided only for four-year terms, and that such a power would interfere with the right of the states to say how their electors are to be chosen.

155. *Id.* at 7785.

156. *Id.* at 7786. Only Democrats opposed it while 47 Republicans and 3 Democrats favored it.

157. *Id.* at 8634-35. Ten Democrats and one Republican opposed the bill.

158. 62 Stat. 677 (1948), 3 U.S.C. § 19(a)(1) (1958).

159. 62 Stat. 677 (1948), 3 U.S.C. § 19(b) (1958). The act is not entirely clear on whether a new Speaker, elected after a Speaker has resigned to act as President, is next in line. The legislative history of the act argues for the new Speaker. See 93 Cong. Rec. 8626

does so until the end of the presidential term except in cases of failure to qualify or inability, in which cases he acts until a President or Vice-President qualifies or recovers from an inability. (If the President pro tempore acts, he cannot be replaced by a new Speaker.)

If there should be no Speaker or President pro tempore at the time of an emergency, then the line of succession runs to the highest on the following list who is not under a disability to discharge the powers and duties of the President: Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Postmaster General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor.¹⁶⁰ A Cabinet officer automatically resigns his departmental position upon taking the presidential oath of office. He acts as President for the rest of the term or until a President, Vice-President, Speaker or President pro tempore is available.¹⁶¹ The 1947 law makes it clear that no one may act as President who does not have the constitutional requirements for the Presidency.¹⁶²

D. *Present Proposals*

The 1947 Act, like the Acts of 1792 and 1886, has never been applied.¹⁶³ Since President Kennedy's death—the only death in office of

(remarks of Representative Robson), 8622 (remarks of Representative Michener), 7696 (remarks of Senator Wherry)(1947); 91 id. at 7009 (remarks of Representative Allen) (1945). See also 62 Stat. 677 (1948), 3 U.S.C. § 19(a)(2) (1958), providing that: "The same rule shall apply in the case of the death, resignation, removal from office, or inability of an individual acting as President under this subsection." Furthermore, the act is not explicit that the Speaker and President pro tempore would have to take the presidential oath, though such was intended. Their resigning from the Congress and the taking of the oath would probably be simultaneous so that, in a sense, at the time that they act as President, they would still be "officers."

160. Subsection (e) of the act provides that only such officers appointed by and with the advice and consent of the Senate prior to the happening of the particular contingency and not under impeachment at the time by the House of Representatives are eligible. 62 Stat. 677 (1948), 3 U.S.C. § 19(e) (1958). It will be noted that the Secretary of Health, Education and Welfare has never been added to the line of succession.

161. Thus, a Secretary of Treasury who acts can not be superseded by a Secretary of State.

162. See text accompanying notes 34-36 *supra*. Subsection (f) provides that an individual who acts as President is paid at the rate then applicable to the President. 62 Stat. 677 (1948), 3 U.S.C. § 19(f) (1958).

163. Is it unconstitutional? Some outstanding authorities think it is. See Silva, *The Presidential Succession Act of 1947*, 47 Mich. L. Rev. 451 (1949). Professor Silva states that the interpretation that "the Constitution does not contemplate the presiding legislative officers as officers of the United States," is "supported by all the commentators." *Id.* at 463-64. She says that the 1947 law provides for succession by the Speaker and President pro tempore on the basis of their status as presiding officers and not as Members of Congress. (The Constitution does not require that they be Members of Congress, though

a President since the enactment of the 1947 Act—the lines for and against the law have been clearly drawn. Former President Eisenhower stands first in the group which opposes the law:

[I]f you have a line of succession which, right after the Vice-President, brings in two of the legislative group, you can have a very, very bad situation arise . . . in a period of crisis. For six years of my administration, of course, I had a Congress that was controlled by the Democrats, so right behind Mr. Nixon in the line of succession stood, under the present law, Mr. Rayburn, the Speaker of the House . . . [M]y immediate predecessor . . . had . . . the same experience I did in reverse. He had Mr. Martin . . . [W]hen there was no Vice-President, you would have had different parties taking over suddenly . . . the Executive department You can't change it over night and get it working effectively. I believe that if the electorate says that such-and-such a party should have the White House for four years, it ought to have the White House for four years.¹⁶⁴

In contrast, President Truman favors the present law, for the following reasons:

The Speaker of the House has usually been a member of the House for a good, long time before he's ever elected Speaker, he comes more nearly being elected by the country at large than any other public servant in the federal government and of

they have always been and, without a doubt, will always be.) For other articles in point, see Kallenbach, *The New Presidential Succession Act*, 41 *Am. Pol. Sci. Rev.* 931, 939-41 (1947); Wilmerding, Jr., *Wash. Post*, Dec. 8, 1963, p. 1, cols. 2-3. See also Rankin, *Presidential Succession in the United States*, 8 *J. of Politics* 44, 51-55 (1946).

Space limitations will not permit a detailed examination of the question. Suffice it to say that it seems unlikely that the Supreme Court would ever declare the law unconstitutional. The Court would, most likely, be faced with the question at the time one of the presiding officers had taken over. It is suggested that under such circumstances the Court would avoid the question by saying it involved a political question—or if it did decide it, would hold that the Speaker and President *pro tempore* are United States officers, based on the long acquiescence in the 1792 law and the Court's decision in *Lamar v. United States*, 241 U.S. 103 (1916). See notes 138 *supra* & 166 *infra*.

It is to be noted that no constitutional problems are created when the Speaker or President *pro tempore* acts in a case where neither a President-elect nor a Vice-President-elect has qualified. The twentieth amendment provides that Congress may declare what "person" shall act in such a case.

164. CBS Reports, Transcript of "The Crisis of Presidential Succession," Jan. 8, 1964, pp. 35-36. Eisenhower further stated that: "If the Presidency went to a member of the Cabinet, then if that man had more than one year to serve his Presidency, I think they [sic] might be called a special election and . . . let the people decide this thing." *Id.* at 38. See Lippmann, *The Presidential Succession*, *N.Y. Herald Tribune*, Dec. 12, 1963, p. 24, cols. 4-6 (Cabinet, with a special election proviso); Wilmerding, Jr., *Wash. Post*, Dec. 8, 1963, p. 1, cols. 2-3 (Cabinet, plus midterm election for President); *Wash. Post*, Jan. 10, 1964, p. A12, cols. 2-4.

Interestingly, CBS Reports interviewed 59 Senators, of whom most said "something can and must be done about the line of succession. Only one or two think nothing need be done about [it]. . . ." CBS Reports, *supra*, at 47. See *N.Y. Times*, Feb. 23, 1964, § 4 (The News of the Week in Review), p. 8E, cols. 1-2 (advocates re-establishing the Cabinet line of succession).

course, that's the reason I placed him next to the Vice-President in the succession . . . ¹⁶⁵

Whether the Speaker and President pro tempore should be removed from the line of succession in favor of immediate succession after the Vice-President by the heads of the executive departments (in order to insure continuity of policy and administration) and whether the present law is more democratic than the law of 1886 are issues more of the nature of policy than not.¹⁶⁶ History shows that reasonable men have

165. CBS Reports, *supra* note 164, at 36. Truman's first preference, however, which he expressed several years ago, is to have the last electoral college meet to elect a new Vice-President whenever a vacancy occurs in that office. *Id.* at 40-41. Senator Kenneth B. Keating of New York has stated that: "I don't like the succession to the regular members of the Cabinet because . . . One, they are not elected officials. Second, they are very apt to be specialists in their field." *Id.* at 37. Speaker John McCormack also supports the present law ("I supported the 1947 Act recommended by former President Harry S. Truman and I still support it.") and notes that the Members of Congress "are pretty much wedded" to it. *Id.* at 43-44; see *N.Y. Times*, Dec. 9, 1963, p. 1, cols. 2-3. See also Lawrence, *People's Right to Elect and the Succession Law*, *N.Y. Herald Tribune*, Dec. 9, 1963, p. 24, cols. 1-2 (author says that law must be made clear on the point that a new Speaker succeeds if the former one is acting as President).

President Johnson, who voted for the present law when he was a Representative, has properly sought to give it some meaning by asking Speaker McCormack to sit in on sessions of the National Security Council and "other key decision-making meetings" not "inconsistent with his legislative responsibilities," *N.Y. Times*, Dec. 4, 1963, p. 1, cols. 6-7, and by establishing a verbal agreement to cover cases of presidential inability, *id.*, Dec. 6, 1963, p. 1, col. 8. The Speaker's legislative role will prevent him from taking part in Cabinet meetings. It is reported that under President Kennedy, Cabinet meetings were seldom held and, when they were, they were seldom used for formulating over-all domestic and foreign policies. Sidey, *John F. Kennedy, President 68* (1963).

166. To be noted are the following facts about the state succession laws:

(1) Of the thirty-eight states having lieutenant governors as the immediate successor after the Governor:

(a) The President pro tempore and the Speaker, respectively, are the next successors in eighteen. Ala. Const. art. V, § 127; Ark. Const. amend. VI, § 4; Cal. Const. art. V, § 16; Colo. Const. art. IV, §§ 13-15; Idaho Const. art. IV, §§ 12-14; Ill. Const. art. V, §§ 17, 19; Iowa Const. art. IV, §§ 17, 19; Kan. Const. art. I, §§ 11, 13; Minn. Const. art. V, § 6; Miss. Const. art. V, § 131; Mo. Const. art. IV, § 11; Mont. Const. art. VII, §§ 14-16; Nev. Const. art. V, §§ 17-18; N.Y. Const. art. IV, § 5; N.C. Const. art. III, § 12; Ohio Const. art. III, §§ 15, 17; Okla. Const. art. VI, §§ 15-16; Pa. Const. art. IV, §§ 13-14.

(b) The Speaker and President pro tempore, respectively, are the next successors in two. S.D. Const. art. IV, §§ 6-7; Vt. Const. ch. II, § 24.

(c) The President pro tempore is the next successor in seven. (The Speaker is not in the line of succession.) Conn. Const. art. IV, §§ 17-19; Ind. Const. art. 5, § 10; Ky. Const. §§ 84-85; La. Const. art. V, § 6; R.I. Const. art. VII, §§ 9-10; S.C. Const. art. IV, § 9; Tex. Const. art. IV, §§ 16-17.

(d) The Speaker is the next successor in two. (The President pro tempore is not in the line of succession.) Ga. Const. art. V, § 2-3007; Neb. Const. art. IV, §§ 16, 18.

(e) The secretary of state is next in line in seven. Del. Const. art. III, § 20; Mass. Const. pt. II, ch. II, § 2, art. III; Mich. Const. art. V, § 26; N.M. Const. art. V, § 7; N.D. Const.

differed over the answers to these questions. Yet, the death of President Kennedy has focused attention on a more lasting and acceptable solution to the problem, one which has not received any real consideration until now—the filling of a vacancy in the Vice-Presidency. It is generally agreed that the Vice-President is the official in the best position to succeed to the Presidency and insure the continuum which was so magnificently revealed during the weeks following the tragic and unexpected death of President Kennedy.¹⁶⁷

art. III, §§ 72, 77; Wash. Const. art. III, § 10; Wis. Const. art. V, § 7. In four of these states, the President pro tempore and Speaker are somewhere in the line of succession—Delaware, New Mexico, North Dakota and Wisconsin.

(f) The attorney general is next in line in one. Va. Const. art. V, § 78. In that state, he is followed by the Speaker and President pro tempore.

(g) One state has only a lieutenant governor in the line of succession. Hawaii Const. art. IV, § 4.

(2) Of the twelve states having no lieutenant governor:

(a) The President of the Senate and the Speaker, respectively, are the immediate successors to the Governor in eight. Fla. Const. art. IV, § 19; Me. Const. art. V, pt. 1, § 14; Md. Const. art. II, § 7; N.H. Const. pt. II, art. 49; N.J. Const. art. V, § 1, ¶¶ 6-7; Ore. Const. art. V, § 8; Tenn. Const. art. III, § 12; W. Va. Const. art. VII, § 16.

(b) The secretary of state is first in line in four states. Alaska Const. art. III, §§ 10-13; Ariz. Const. art. V, § 6; Utah Const. art. VII, § 11; Wyo. Const. art. IV, § 6. In Utah, he is followed by the President of the Senate; in Wyoming, by the President of the Senate and Speaker.

In recent years, a number of states have passed so-called "Disaster Acts," increasing the number of persons in the line of succession. See, e.g., Ark. Stat. Ann. § 12-117 (Supp. 1963); Cal. Gov't Code § 12061; Fla. Stat. Ann. § 22.04 (1961); Idaho Code § 59-1404 (Supp. 1963); Ill. Ann. Stat. ch. 102, § 104 (Smith-Hurd 1963); Iowa Code Ann. § 38A:5 (Supp. 1962); Kan. Gen. Stat. Ann. § 48-1204 (Supp. 1961); Me. Laws 1961, ch. 171, § 21-D; Minn. Stat. Ann. § 4.06 (Supp. 1963); Mont. Rev. Codes Ann. § 82-1309 (Supp. 1963); Neb. Laws 1961, ch. 451, § 1(7); N.H. Rev. Stat. Ann. § 108-A:12 (Supp. 1963); N.J. Stat. Ann. § 52:14A-4 (Supp. 1963); N.M. Stat. Ann. § 4-18-4 (Supp. 1963); N.Y. Unconsol. Laws § 9105 (McKinney 1961); N.C. Gen. Stat. § 147-11.1 (Supp. 1963); N.D. Cent. Code Ann. § 54-47-03 (Supp. 1963); Ohio Rev. Code Ann. § 161.03 (Page 1963); Okla. Stat. Ann. tit. 63, § 685.4 (Supp. 1963); Ore. Laws 1961, ch. 287, § 3(1); Pa. Stat. Ann. tit. 71, § 779.4 (1962); S.C. Code § 1-1003 (Supp. 1963); Vt. Stat. Ann. tit. 20, § 183 (Supp. 1963); Va. Code Ann. 24-150 (1950); W. Va. Code Ann. § 354(14)4 (1961); Wis. Stat. Ann. § 22.08(3) (Supp. 1963); Wyo. Laws 1961, ch. 199, § 1.

An overwhelming majority of the states have a line of succession with both legislative and executive officials (who are mainly elective). Several states, such as Alaska, Arizona, Massachusetts, Michigan and Washington, have basically a line of executive officers (who are mainly elective), while several others, such as Colorado, Connecticut, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Pennsylvania, Rhode Island, Tennessee and Texas, have basically a line of legislative officers. For additional information about the state succession laws, see Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, supra this volume, at 73, 102-05.

167. "It is significant that every measure placed before this Committee since President Kennedy's assassination agrees on one vital point—that we shall have a Vice President." Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee

The proposals to fill a vacancy differ in certain features. Former President Truman and former Vice-President Nixon suggest the filling of the vacancy by the last electoral college.¹⁰⁸ Senator Birch Bayh of Indiana proposes that when an elected Vice-President succeeds to the Presidency, he shall, within thirty days, nominate a person who would, upon confirmation by the House and Senate, become Vice-President.¹⁶⁹ Representative Ayres would have the President submit a list of not less than three nor more than five names to either the House¹⁷⁰ or the Senate¹⁷¹ from which a Vice-President would be selected. Senator Jacob K. Javits of New York, on the other hand, would provide for the Congress to elect a Vice-President subject to the President's confirmation.¹⁷²

on the Judiciary, 88th Cong., 2d Sess. — (1964) (statement of Senator Birch Bayh) [hereinafter cited as 1964 Senate Hearings]. Interestingly, France adopted a presidential system in 1962, without an office of Vice-President. Many Frenchmen are concerned about the possibility of a chaotic situation arising if President Charles de Gaulle should die in office. (The Constitutional successor is the President of the Senate.) Hence, there is demand that an office of Vice-President be created. See *Le Monde*, Nov. 26, 1963, pp. 1, 9; Geniger, *France's No. 2 Man*, N.Y. Times, Jan. 5, 1964, § 6 (Magazine), p. 24.

168. See Nixon, *We Need a Vice President Now*, Saturday Evening Post, Jan. 18, 1964, p. 6; note 165 *supra*; Allen, *Help Wanted: A U.S. Vice President*, Reader's Digest 73 (March 1964).

169. S.J. Res. 139, 88th Cong., 1st Sess. (1963) (joined in by Senators Pell, Randolph, Bible, Moss and Burdick). The bill is not clear on whether the two Houses of Congress would meet in joint session or separately and whether the House of Representatives would vote by states or not. If the House would not vote by states, its say would be 435 as against the Senate's 100.

To cover the case of a double vacancy, provision is made in the bill for a Cabinet line of succession. Whoever succeeds does so for the rest of the term and he would be required to nominate a person for Vice-President. The so-called Bayh bill also includes some provisions on presidential inability. See note 201 *infra*.

170. H.R. 9305, 88th Cong., 1st Sess. (1963). A quorum of the House would consist of a member or members from two thirds of the states and a majority of all the states would be necessary to a choice. (The House would vote by states.)

The bill is clearly objectionable because it does not set any time by which the President would have to submit the names and it could well result in no one obtaining a majority of the states' votes. Moreover, it suffers from a more serious objection of constitutionality. The only authority Congress has to fill a vacancy in the Vice-Presidency is when there are vacancies in both the offices of President and Vice-President. See note 79 *supra*. Furthermore, this bill is inconsistent with article II, section 1, clause 1 of the Constitution, which states that the Vice-President shall "be elected, as follows." There is also an argument that the new Vice-President would be required to serve a four-year term, since this is the only term provided for in the Constitution. See note 130 *supra*. A constitutional amendment is clearly essential.

171. H.J. Res. 818, 88th Cong., 1st Sess. (1963). This proposal calls for a constitutional amendment under which a majority of the Senate would select the Vice-President. See note 170 *supra*.

172. S.J. Res. 138, 88th Cong., 1st Sess. (1963). Congress would meet in joint session and if a quorum of each House were present, the Congress would elect by majority vote

Senator Kenneth B. Keating favors the election of two Vice-Presidents every four years.¹⁷³

Participation by the electoral college is objectionable as its functions are purely ministerial in nature¹⁷⁴ and, as Senator Bayh noted:

The Electoral College is not chosen, as is Congress, to exercise any considered judgment or reasoning. Its members are chosen merely to carry out the will of the voters in their respective states. . . . The Electoral College is not equipped, nor should it be equipped, to conduct hearings on the qualifications of the nominee submitted by the President. It would be a cumbersome body to try to assemble quickly and to get to act quickly in emergencies. Much of the general public has no earthly

(each member having one vote) a Vice-President from the heads of the executive departments or Members of Congress. As originally proposed, Congress was given exclusive authority to select the Vice-President. This was later modified with the addition of the words "by and with the advice and consent of the President." The reason for the change was to assure that in electing a Vice-President, Congress would give "considerable weight to the views of the President." *N.Y. Times*, Jan. 24, 1964, p. 15, col. 3.

Senator Ervin's S.J. Res. 147, 88th Cong., 2d Sess. (1964), would provide that within ten days after a vacancy, Congress would meet in joint session to select a new Vice-President. A majority vote would be necessary for a selection, each Member of Congress having one vote. (If a double vacancy occurred, Congress would fill both offices within ten days, the statutory successor acting in the interim.) Senator Gary's proposal is similar except that it does not make clear how the House would vote. H.J. Res. 858, 88th Cong., 1st Sess. (1963).

173. S.J. Res. 143, 88th Cong., 2d Sess. (1964); see notes 70-71 *supra*. A similar proposal has been made by Representative Auchincloss. H.J. Res. 868, 88th Cong., 1st Sess. (1963). His Vice-Presidents would be First Vice-President and Second, instead of Executive and Legislative. Senator Keating argues that his two Vice-Presidents would be selected from the most competent people in the party, that most Senators, Representatives and Governors would be interested in either position, that the legislative Vice-President would be no less busy than the Vice-President is now, that there is much room for the President to delegate important tasks to both, and that both Vice-Presidents would be of the President's party and elected by the people. 1964 Senate Hearings—(statement of Senator Keating).

For Constitutions having two or more Vice-Presidents (or Designates), see Costa Rica Const. art. 135 (two Vice-Presidents elected by people); Guat. Const. art. 166 (two Designates elected by Congress from three proposed by President); Hond. Const. art. 201 (three Designates elected by people); Pan. Const. arts. 138, 149 (two Vice-Presidents elected by people). For Constitutions having only one Vice-President (or Designate), see Argen. Const. art. 75; Bol. Const. art. 91; Braz. Const. art. 79; Dahomey Const. art. 9; Ecuador Const. art. 100; El Sal. Const. art. 64; India Const. art. 48; Liberia Const. art. 3, § 2; Phil. Const. art. 7, § 2. Ecuador, India and Liberia provide for special elections in case of vacancies in the Vice-Presidency. Argentina, Bolivia, Brazil and India provide for a special election in case of a double vacancy. For general information about the succession laws of foreign countries having a President for Chief Executive, see Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, *supra* this volume, at 73, 105-10.

174. In fact, over the last few years, much attention has been given to proposals calling for the abolition of the electoral college. See, e.g., Hearings Before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee on Nomination and Election of President and Vice President, 88th Cong., 1st Sess. (1961) (Parts 1-5); see generally Margolin, *Proposals to Reform Our Electoral System* (Lib. Cong. Legis. Ref. Serv., 1960). See S.J. Res., 88th Cong., 2d Sess. (1964) (Senator Smathers).

idea who their state's electors are and would be understandably hesitant to allow any such unknown quantity to make an important decision like confirmation of a Vice President of the United States.¹⁷⁵

Congress is a far better body to participate in the selection of a new Vice-President, primarily because it is representative of the people and its Members are in a position to exercise a considered judgment.¹⁷⁶ Since Congress is a political body, it would be preferable to give the succeeding President the dominant role in the selection.¹⁷⁷ Otherwise, if a different party were in control of Congress, a person of that party might be elected, which could frustrate the purpose for obtaining a new Vice-President, *i.e.*, to give him the "on the job training" for assuming the responsibilities of the Presidency, should he ever have to do so.

The new Vice-President should be of the same party as the President, of compatible temperament, and of presidential ability. There is much merit in the proposal that the President nominate a person subject to congressional approval. The presidential candidate now selects his running mate so that such a nomination would be consistent with present practice. As the people must give their stamp of approval to the presidential and vice-presidential candidates in order for them to be elected, so, too, here their representatives in Congress would have to give their approval to the nominee before he could become Vice-President. The submission of a list of names by the new President to Congress would not assure the election of the person with whom the President could most effectively work.

Whatever proposal is adopted should contain a time limit within which the President would have to make his choice. It probably would be unwise to require action by Congress within a specified period of time, though the inclusion of the word "forthwith" might serve a useful purpose. In any event, it is very likely that Congress would act quickly, putting partisan activities aside, to approve the President's choice.

Everything considered, it seems clear that the best way to solve the problem of the succession is to fill the vacancy in the Vice-Presidency. Secretaries of State and Speakers are not chosen on the basis of their

175. 1964 Senate Hearings —.

176. Of course, the most democratic way to fill the vacancy would be by direct election. Such an election, however, would necessitate changes in the election laws of the various states and would come at a time of distress (if the Vice-President had succeeded to the Presidency), when conditions would be least conducive to the holding of a "political" election.

177. It is suggested that no special election should be held to fill vacancies in the offices of President and Vice-President, should they be vacant at the same time. The acting President would be in no position to act effectively as a President if he knew an election was in the offing. Also, the people would be in no mood for such an election and the political campaigns it would entail. See note 176 *supra*.

qualifications for the Presidency. A person selected to fill a vacancy in the Vice-Presidency would, very likely, be chosen because of his qualifications to substitute for the President. The chances of his being ready and able to assume the responsibilities of the Presidency are far greater than those of any other official.

III. PRESIDENTIAL INABILITY

President Kennedy's death has also revived the critical problem of presidential inability. As former Vice-President Nixon noted: "It is a tragic fact that it took a terrible crime in Dallas to remind us of a serious defect in our constitutional process."¹⁷⁸ Had our late President lived, hovering unconscious between life and death, discontinuity and disorder might well have invaded the American Government. If a vital decision had had to be made, would there have been anyone to make it? Former President Eisenhower underscored the shocking deficiency in our system in his recent book, when, in speaking of the period surrounding his heart attack, he stated:

I was not required to make any immediate operational decisions involving the use of the armed forces of the United States. Certainly, had there been an emergency such as the detection of incoming enemy bombers, on which I would have had to make a rapid decision regarding the use of United States retaliatory might, there could have been no question, *after* the first forty-eight hours of my heart attack, of my capacity to act according to my own judgment. *However*, had a situation arisen such as occurred in 1958 in which I eventually sent troops ashore in Lebanon, the concentration, the weighing of the pros and cons, and the final determination would have represented a burden, during the first week of my illness, which the doctors would likely have found unacceptable for a new cardiac patient to bear.¹⁷⁹

What would have happened if a "rapid decision" had been required during the first forty-eight hours or a Lebanon situation had arisen during the first week is anybody's guess.

A. *The Problem*

The problem of presidential inability has been with us for over one hundred and seventy-five years.¹⁸⁰ It has been frequently discussed but never solved. The problem exists because the Constitution of the United States does not clearly provide that the Vice-President may temporarily act as President during a period of inability,¹⁸¹ and because

178. Nixon, *supra* note 168, at 10.

179. Eisenhower, *Mandate for Change* 545 (1963). (Emphasis added.)

180. For studies of the problem, see Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, *supra* this volume, at 73; Hansen, *The Year We Had No President* (1962); Silva, *Presidential Succession* (1962). For a listing of recent articles, see note 3 *supra*.

181. See text accompanying note 1 *supra*.

it does not define inability, nor indicate who may initiate and decide the questions of whether inability has occurred or ended. No more complete statement of this manifold problem can be found than that of Chester A. Arthur in his special message to Congress on December 6, 1881—over eighty-two years ago. In that message, he asked Congress to solve a problem with which he had been confronted for eighty days while President Garfield lay dying. Said Arthur:

Is the inability limited in its nature to long-continued intellectual incapacity, or has it a broader import?

What must be its extent and duration?

How must its existence be established?

Has the President whose inability is the subject of inquiry any voice in determining whether or not it exists, or is the decision of that momentous and delicate question confided to the Vice-President, or is it contemplated by the Constitution that Congress should provide by law precisely what should constitute inability, and how and by what tribunal or authority it should be ascertained?

If the inability proves to be temporary in its nature, and during its continuance the Vice-President lawfully exercises the functions of the Executive, by what tenure does he hold his office?

Does he continue as President for the remainder of the four years' term?

Or would the elected President, if his inability should cease in the interval, be empowered to resume his office?

And if, having such lawful authority, he should exercise it, would the Vice-President be thereupon empowered to resume his powers and duties as such?¹⁸²

Mainly because of the precedent established by John Tyler in 1841¹⁸³ and because of the vagueness of the Constitution in regard to inability, on three different occasions in our history (1881, 1919-1920, and 1955-1956) the country was for a time without an able President. On two of these occasions, the federal administration simply drifted¹⁸⁴ while, on

182. 8 Richardson, *Messages and Papers of the Presidents, 1789-1797*, at 65 (1898).

183. See text accompanying notes 48-53 *supra*.

184. The first case is that of President Garfield, who was shot on July 2, 1881 and died on September 19, 1881. During the disability his only governmental act was that of signing an extradition paper. Not once did Vice-President Arthur see Garfield during the eighty days. Arthur refused to act as President, although a majority of the Cabinet felt that he should. However, a majority of the Cabinet and many authorities of the day believed that, were he to act, he would become President for the remainder of the term.

The second case is that of President Wilson, who became ill on September 25, 1919, and had a stroke on October 2, 1919. In the first six weeks of the inability, twenty-eight bills became law by default of any action by the President. No official Cabinet meeting was held until April 13, 1920. The President was shielded from all by his wife, doctor and close friends so that the extent of his inability was never fully known. Vice-President Marshall declined to act and Secretary of State Lansing was discharged for his efforts to give some direction to the Government. See generally Smith, *When the Cheering Stopped* (1964), for an excellent account of the plight of the Government during Wilson's inability.

For a detailed account of these disabilities, see Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, *supra* this volume, at 73, 93-98.

the third, it was directed by a small group of men.¹⁸⁵ However,

[The committee system] worked during the period of President Eisenhower's heart attack mainly because . . . there were no serious international crises at that time. But had there been a serious international crisis requiring Presidential decisions, then . . . the committee system might not have worked.¹⁸⁶

It has been estimated that the "sum total of the periods—hours, days, weeks, even months—when the man in the White House was too sick to be capable of exercising the powers vested in him by the Constitution" is one year.¹⁸⁷

B. *Attempts at Solution*

The first act of any real significance in meeting the problem occurred in the early part of 1958. Former President Eisenhower, in a letter addressed to former Vice-President Nixon, formulated the following agreement:

(1) In the event of inability the President would—if possible—so inform the Vice President, and the Vice President would serve as Acting President, exercising the powers and duties of the office until the inability had ended.

(2) In the event of an inability which would prevent the President from so communicating with the Vice President, the Vice President, after such consultation as seems to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the Office and would serve as Acting President until the inability had ended.

(3) The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the Office.¹⁸⁸

185. During the recuperative period after President Eisenhower's heart attack of September 24, 1955, Presidential Assistant Sherman Adams, Vice-President Nixon, Secretary of State John Foster Dulles, Attorney General Herbert Brownell, Secretary of Treasury George M. Humphrey, and White House Assistant Wilton Persons took charge of affairs. For an excellent account of this period, see Eisenhower, *op. cit. supra* note 179, at 535-46; Nixon, *Six Crises* 131-81 (1962).

186. CBS Reports, Transcript of "The Crisis of Presidential Succession," Jan. 8, 1964, pp. 24-25 (former Vice-President Nixon).

187. Hansen, *op. cit. supra* note 180, at 1.

188. White House Press Release, March 3, 1958; see Public Papers of the Presidents of the United States, 1958, at 188-89 (U.S. Gov't Printing Office, 1959). See also Nixon, *Six Crises* 178-80 (1962). Says former President Eisenhower about the agreement: "We decided and this was the thing that frightened me; suppose something happens to you in the turn of a stroke that might incapacitate you mentally and you wouldn't know it and the people around you, wanting to protect you, would probably keep this away from the public, so I decided that what we must do is make the Vice-President decide when the President can no longer carry on, and then he should take over the duties and when the President became convinced that he could take back his duties, he would be the one to decide." CBS Reports, *supra* note 186, at 23-24. Former Vice-President Nixon recently noted that the agreement is merely informal and that the problem of inability can only be solved by a constitutional

This agreement was followed, in turn, by President Kennedy and Vice-President Johnson in August, 1961,¹⁸⁹ and, more recently, by President Johnson and Speaker McCormack.¹⁹⁰ The Johnson-McCormack agreement is now in writing.¹⁹¹

The above agreement serves a useful purpose but by no means is it a satisfactory permanent solution to the problem. First, it does not have the force of law, and has no binding effect if one or both of the parties should decide to break it. Second, it does not deal with the situation where the person next in line after the President becomes disabled before the President does. Finally, it does not solve the constitutional problem created by the Tyler precedent: Should the Vice-President permanently replace the President in cases of inability?

C. *A Practical Solution*

One of the best proposals to solve the problem on a permanent basis was recently advanced by a special panel of lawyers called together by the American Bar Association.¹⁹² Included among its members were such well-known personages as: former Attorney General Herbert Brownell; Walter E. Craig, President of the American Bar Association; Professor Paul A. Freund of the Harvard Law School; former Deputy Attorney General Ross L. Malone; Dean Charles B. Nutting of the National Law Center; Lewis F. Powell, Jr., President-elect of the American Bar Association; and Sylvester C. Smith, Jr., former President of the American Bar Association.¹⁹³ The panel reached a consensus which recommended that the Constitution be amended to provide:

(1) In the event of the inability of the President, the powers and duties, but not the office, shall devolve upon the Vice-President or person next in line of succession

amendment. Nixon, *op. cit.* supra note 185, at 180. He states: "We just can't have this great government of the United States run in that way, by the whims and the personal reactions of whoever may be Vice President, or President, or the wife of the President at a critical time." *Id.* at 27. See Nixon, *supra* note 168, at 10.

189. White House Press Release, August 10, 1961; see *Public Papers of the Presidents of the United States, 1961*, at 561-62 U.S. Gov't Printing Office, 1962. See also 42 Ops. Att'y Gen. No. 5 (1961).

190. N.Y. Times, Dec. 6, 1963, p. 1, col. 8.

191. *Id.* p. 19, col. 1.

192. See N.Y. Times, Jan. 22, 1964, p. 38L, cols. 7 & 8; Wash. Post, Jan. 22, 1964, p. A2, col. 5.

193. Other members were Jonathan C. Gibson of Chicago; Richard Hansen of Nebraska, author of "The Year We Had No President" (1962); Professor James C. Kirby, Jr. of Vanderbilt University, former chief counsel of the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee; Martin Taylor, chairman of the Committee on Federal Constitution of the New York State Bar Association; Edward Wright, chairman of the House of Delegates of the American Bar Association; and the author.

for the duration of the inability of the President or until expiration of his term of office;

(2) The inability of the President may be established by declaration in writing of the President. In the event that the President does not make known his inability, it may be established by action of the Vice-President or person next in line of succession with the concurrence of a majority of the Cabinet or by action of such other body as the Congress may by law provide;

(3) The ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice-President and a majority of the Cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President, the continuing disability of the President may then be determined by the vote of two-thirds of the elected members of each House of the Congress;

(4) In the event of the death, resignation or removal of the President, the Vice-President or the person next in line of succession shall succeed to the office for the unexpired term; and

(5) When a vacancy occurs in the office of the Vice-President the President shall nominate a person who, upon approval by a majority of the elected members of Congress meeting in joint session, shall then become Vice-President for the unexpired term.

Point (1) was inserted to eliminate the ambiguous wording of the succession clause which prevented Vice-Presidents Chester A. Arthur and Thomas R. Marshall from acting as President for fear that, by virtue of the Tyler precedent, the Constitution would make them President for the remainder of the term without regard to the cessation of inability.¹⁹⁴ This clause makes it indisputably clear that the Vice-President merely acts as President when the President is unable.¹⁹⁵

Point (2) would allow the President to declare his own inability since there is no good reason why he should not be able to do so. If he used this as a pretense for shirking his duties, impeachment would lie. The panel felt that the giving of this power to the President might have the effect of encouraging cooperation among him, the Vice-President, and the Cabinet in inability situations—obviously, a thing to be desired. The possibility of a disabled President's refusing to declare his inability or actually being unable to make any determination at all required a provision that someone or some body have the power to make the determination in such cases. The panel believed that the Vice-President

194. See notes 48-53 *supra*. Since the Constitution clearly provides in article II, section 1, clause 6 (see text accompanying note 1 *supra*) that "the Same" devolves in all cases (i.e., death, resignation, removal and inability), Tyler's assumption of the office of President upon President Harrison's death proved to be a formidable barrier.

195. The expression "inability" was left general so that it would cover an almost unlimited number of cases—e.g., physical or mental illness, kidnaping, wartime capture, etc. It would not cover incompetence, lack of judgment, laziness, misconduct, or other possible grounds for impeachment. See 1964 Senate Hearings — (statement of Senator Keating).

(or person next in line) should not have the sole power as he would be an interested party and, therefore, might be too reluctant to make a determination. The Vice-President was included in the determination process, however, because it is his duty to act and, therefore, it is only proper that he have some voice in determining when that duty is to be performed. The Cabinet (or the heads of the executive departments) was thought to be the best possible body.¹⁹⁶ The facts that Cabinet members are close to the President, that they would, very likely, be aware of an inability and would know if the circumstances were such that the Vice-President should act, that they are part of the Executive Department, and that the public would have confidence in the rightness of their decision were the primary considerations for the selection of this body. That such a Cabinet method would involve no violation of the principle of separation of powers was underscored. Since the method would be embodied in the Constitution, itself, it was thought desirable to include a clause allowing Congress to change, by legislation, the body which would function with the Vice-President. It was doubted that this power would ever be resorted to but, if it were, any legislation passed under it would be subject to presidential veto. The justification for such a provision was that a constitutional amendment, with specifics, could only be changed by amendment and that it therefore would be wise to leave the door open for change by legislation.

Point (3) was designed to permit the President to resume his powers and duties upon his own declaration in writing. Because of the possibility that a President might say he was able when he was not, it was the panel's consensus that the Vice-President, subject to approval by a majority of the Cabinet, should have the power to prevent him from acting in such a case.¹⁹⁷ In order to weigh the provision as heavily in favor of the President as possible, review by Congress would be required in such a case (the Vice-President would continue to act as

196. Although a Cabinet was not included in the Constitution as a mechanism for assisting the President (see 1 Farrand 1, 70, 97, 110; 2 *id.* at 285, 328, 335-37, 367, 537-42), a provision was nonetheless inserted into the Constitution providing that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective offices . . ." U.S. Const. art. II, § 2, cl. 1. Since the composition of the Cabinet is at the complete discretion of the President, the so-called Cabinet proposals refer to the "Heads of the Executive Departments." (The use of the word "Cabinet" herein is meant in this context.) Thus, there can be no doubt about who would be responsible for the decision.

197. The opinion was expressed that the only check on the President should be that of impeachment. Against the use of impeachment were such arguments as that it takes too long, has the effect of permanently removing the President from office, and may not even be applicable to inability situations. See generally Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, *supra* this volume, at 73, 127-28.

President in the interim). It would take a two-thirds vote of the whole Congress to prevent the President from resuming his powers and duties.

Point (4) would give constitutional status to the Tyler precedent in cases of complete vacancy.¹⁹⁸

Point (5) would meet the problem of a vacancy in the Vice-Presidency.¹⁹⁹

What is significant about the consensus of the panel is that the method of determining inability and recovery would be embodied in the Constitution.²⁰⁰ It was agreed that this would be desirable for several reasons. First, it was felt that an amendment which would merely give Congress a broad power to establish (by legislation) a method for determining the beginning and ending of an inability would be no solution at all, since Congress would still have to agree on a method. Second, since such a constitutional amendment would place the question of inability in the "political arena" where the question of succession has always been, it was believed advisable to include a method in the Constitution itself. Third, as the Constitution is very specific as to how a President is to be elected and removed, it should be similarly specific with regard to divesting the President of his powers, even temporarily, as in the case of inability. Fourth, the method might otherwise violate the principle of separation of powers.

The panel proposal, which has been endorsed by the American Bar Association, has received very favorable comment in and out of Congress.²⁰¹ Although other proposals have been advanced,²⁰² this proposal

198. See text accompanying note 52 *supra*.

199. See text accompanying notes 168-72 *supra*.

200. For a discussion of the advisability of including the method in the Constitution itself, see Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, *supra* this volume, at 73, 120-21. *Id.* at 115-16, where the various proposals not to include the method are discussed.

201. See Krock, *Basic Principles Emerging From the Fog*, *N.Y. Times*, Jan. 24, 1964, p. 26, col. 6; *N.Y. Times*, Jan. 22, 1964, p. 38L, cols. 7-8; *Wash. Post*, Jan. 26, 1964, p. E6, cols. 1-2; *Wash. Post*, Jan. 23, 1964, p. A1, cols. 2-3; *Wash. Post*, Jan. 22, 1964, p. A2, col. 5. See also T. Lewis, *Capitol Stuff*, *Daily News*, Jan. 23, 1964, p. 4, cols. 5-6; 1964 Senate Hearings—(statements of Senator Birch Bayh and Professor James C. Kirby, Jr.).

The proposal of the ABA panel is essentially in agreement with that of Senator Birch Bayh's resolution, S.J. Res. 139, 88th Cong., 1st Sess. (1963), with these exceptions: The Bayh proposal would not give Congress any power at all to change the method embodied in the amendment and it would require the Vice-President (provided he is supported by a majority of the Cabinet), in a case where he disagrees with the President's declaration of recovery, to bring the matter before Congress within seven days. For similar proposals, see S.J. Res. 28, 88th Cong., 1st Sess. (1963) (former Senator Estes Kefauver); same, S.J. Res. 19, 87th Cong., 1st Sess. (1961); H.R.J. Res. 272, 88th Cong., 1st Sess. (1963) (Representative John V. Lindsay); same, H.R.J. Res. 529, 87th Cong., 1st Sess. (1961).

202. Some of the recent proposals are:

(1) That a blue-ribbon presidential commission be established to study all the problems

presently offers the best hope of solving the problem. Without further legislation, it is complete, practical, consistent with the principle of separation of powers, gives the decisive role to those in whom the people would most likely have confidence, involves only persons who have been elected by the people or approved by their representatives, and embodies checks on all concerned—the President, Vice-President and Cabinet. And, since it is embodied in a constitutional amendment, there would be no question about its constitutionality.²⁰³

It is essential that this problem be solved now, while the tragedy of November 22 is still fresh in our memory. As former Vice-President Nixon noted:

involved. Burns, *Let's Stop Gambling With the Presidency*, Saturday Evening Post, Jan. 25, 1964, p. 12, at 16; Morris, *The Muddled Problem of the Succession*, N.Y. Times, Dec. 15, 1963, § 6 (Magazine), p. 11, at 63; Nixon, *supra* note 168, at 10; see also N.Y. Times, Jan. 23, 1964, p. 18C, col. 6 (views of Senator Mike Monroney);

(2) Justice Samuel H. Hofstadter of the New York Supreme Court and Jacob M. Dinnes of New York suggest a self-executing constitutional amendment along these lines: Within ten days after his inauguration, the President would appoint nine members to a "Commission on Inability," to hold office at his pleasure. Three members would come from the Cabinet, two from the Supreme Court, and two each from the House and Senate. The commission, by six votes (two from the Cabinet and at least one from every other group) could declare the President disabled. The cessation of the inability would take only a majority vote. Provision is also made for the President to declare his own inability and, in such a case, the cessation thereof. Hofstadter & Dinnes, *Presidential Inability: A Constitutional Amendment Is Needed Now*, 50 A.B.A.J. 59 (1964). For other proposals of inability commissions, see CBS Reports, Transcript of "The Crisis of Presidential Succession," Jan. 8, 1964, pp. 29 (Senator Kenneth B. Keating of New York), 30-31 (former President Truman); Burns, *supra*, at 12; H.R. 1164, 88th Cong., 1st Sess. (1963) (Representative Louis C. Wyman of New Hampshire). See also Morris, *Political Scientists Criticize the Law on Line of Presidential Succession*, N.Y. Times, Feb. 16, 1964, p. 48, col. 1 (summarizes replies received by Senator Hubert H. Humphrey to a questionnaire).

(3) Senator Kenneth B. Keating and others suggest a constitutional amendment as follows: "The commencement and termination of any inability shall be determined by such method as Congress shall by law provide." S.J. Res. 143, 88th Cong., 2d Sess. — (1964); see Letter From Martin Taylor to New York Times, Dec. 22, 1963, § 4 (The News of the Week in Review), p. 6E, col. 7. This amendment was approved by the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee prior to President Kennedy's death. N.Y. Times, Dec. 7, 1963, p. 26, col. 1.

(4) For a discussion of the proposals advanced prior to the President's death, see Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, *supra* this volume, at 73, 110-20; and see *id.* at 123-28, for the author's personal views.

203. A constitutional amendment is necessary because there is considerable doubt about Congress' power to legislate in this area. The Constitution indicates that Congress has the power to legislate on the succession, without more. If the Vice-President now has the power to make the determination of inability, as many think, a statute could not, constitutionally take it away. Prudence plainly dictates that the problem be solved by constitutional amendment. See Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, *supra* this volume, at 73, 123-25.

Fifty years ago the country could afford to "muddle along" until the disabled President got well or died. But today when only the President can make the decision to use atomic weapons in the defense of the nation, there could be a critical period when "no finger is on the trigger" because of the illness of the Chief Executive.²⁰⁴

IV. CONCLUSION

The problems of the succession and inability are now before Congress for action. Ideally, both should be solved, together if possible. However, if anything is going to be solved, the problem of inability should be. It has first claim for action. It has been left unsolved for almost two centuries. Thus, as Senator Bayh, the chairman of the Senate Subcommittee on Constitutional Amendments which is studying the problems, noted: "Our obligation to deal with the question of presidential inability is crystal clear. Here we have a constitutional gap—a blind spot, if you will. We must fill this gap if we are to protect our nation from the possibility of floundering in the sea of public confusion and uncertainty."²⁰⁵ If this and the problem of the succession are not solved now, there is good reason to believe, as former Vice-President Nixon well put it, that "once the elections of '64 are held—[and] we have a new President and Vice President—this is going to be put away until we have another great international crisis. . . . [I]t would be a great tragedy if the American people, at this particular time, missed this opportunity."²⁰⁶

204. Nixon, *supra* note 168, at 10.

205. 1964 Senate Hearings —.

206. CBS Reports, Transcript of "The Crisis of Presidential Succession," Jan. 8, 1964, p. 46.